79-424

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

DOCKET NO.

In the Matter of the Application

of

THE BOARD OF REGENTS of The University of the State of New York and EWALD NYQUIST, as Commissioner of Education and Chief Administrative Officer of the Education Department of the State of New York,

Petitioners,

vs.

MARY TOMANIO,

Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TO THE HONORABLES, THE PRESIDING JUDGE AND THE ASSOCIATE JUDGES OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners above named respectfully pray that a writ of certiorari issue in the

above-captioned case, directed to the United States Circuit Court of Appeals for the Second Circuit to review its judgment dated June 19, 1979 and entered in the Office of the Clerk of that Court on June 19, 1979.

OPINIONS BELOW.

The opinions in the Courts below are:

1. Majority and minority decisions respectively of Circuit Judge Oakes and District Judge Brieant and of Judge Lumbard of the United States Court of Appeals for the Second Circuit, ____ F 2d _____ (Appendix "A").

2. Decision of Judge Foley of the United States District Court for the Northern District of New York, not reported (Appendix "B").

3. Decision of the New York State Court of Appeals, 38 NY 2d 724, 343 N.E. 2d 755, 381 N.Y.S. 2d 37 (Appendix "C").

4. Decision of the Appellate Division of the Supreme Court of the State of New York, Third Department 43 AD 2d 643, 349 N.Y.S. 2d 806 (Appendix "D").

Note. No written decision was issued by the Supreme Court of the State of New York, which entered judgment for Mary Tomanio, and which was reversed by unanimous decision of the Appellate Division and of the New York State Court of Appeals.

JURISDICTION

The judgment sought to be reviewed was dated and entered by the United States Court of Appeals for the Second Circuit June 19, 1979. There was no application for a rehearing and no order has been issued extending the time within which to petition for certiorari.

The statutory provision conferring jurisdiction on this Court is 28 U.S.C. §1254 subdivision (1).

QUESTIONS PRESENTED

1. Has the Court of Appeals for the Second Circuit decided an important question of Constitutional Law erroneously, which question has not been decided by this Court?

2. Has the Court of Appeals for the Second Circuit interpreted a New York State statute in a manner contrary to the interpretation of the same statute, on the same facts, by the highest Court of the State of New York, and has said Court of Appeals violated accepted principles of Federal-State comity?

3. Should this Court, in its supervisory capacity, review the interpretation of the doctrines of "res judicata" and the statute of limitations by the Circuit Court of Appeals for the Second Circuit which interpretation promotes unnecessary litigation and unduly prolongs it and which conflicts with the interpretation in the First Circuit?

CONSTITUTIONAL PROVISIONS INVOLVED

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Former New York Education Law section 6556 providing for the licensure of chiropractors already in practice when the licensing statute became effective;

New York Education Law section 6551 subdivision 1 defining chiropractic;

New York Education Law section 6506 authorizing the Board of Regents to waive specific licensing requirements in any profession or to indorse licenses of other jurisdictions;

42 U.S. Code U.S.C. section 1983, Civil Rights Statute

STATEMENT OF CASE

The initial chiropractic licensing statute was enacted in New York as Chapter 781 of the Laws of 1963, effective July 1, 1963. The statute, as amended and administered, set forth general licensing requirements and an alternative method of qualification for current practitioners which gave them six chances to pass a special examination designed to test the understanding of fundamental concepts and take into account the applicant's experience in actual practice (former New York Education Law section 6556, set forth in Appendix F at pp. F1-F4). Respondent took the special examination six times and failed it. Respondent then took the regular licensince examination, and failed it. The marks on these seven examinations appear as Appendix G. She remains eligible to take and pass the regular licensing examination.

After failing to meet the requirements of the chiropractic licensing statute, respondent applied for a waiver of the examination requirement under a general provision of the Education Law, applicable to all professions, authorizing the waiver of specific licensing requirements "provided the board of regents shall be satisfied that the requirements...have been substantially met" (Education Law section 6506 subdivision 5) (App. F pp. F5-F6). That application was based upon respondent's assertions that she had almost passed the examination, that she was licensed in two other states (Maine and New Hampshire) and that she had passed an examination given by the National Board of

Chiropractic Examiners, a private organization without official status. The application for a waiver of the licensing examination was denied and respondent was so notified by a letter dated November 22, 1971. The denial was based upon the conclusions that almost passing an examination is not the substantial equivalent of passing it, that the licensure requirements in Maine and New Hampshire were not substantially equivalent to those in New York, and that the National Board Examination was not substantially equivalent to the examination required by the New York statutes.

Respondent litigated the merits of the determination in the New York courts, which sustained the denial of her application. The decisions are Appendixes C and D hereto.

In June 1976, over four and one half years after the determination, and seven months after the final judgment of the New York State Court of Appeals, respondent commenced this action in United States District Court for the Northern District of New York, contending that the refusal of petitioners to issue a license to practice chiropractic in the State of New York was a violation of her constitutional rights. The relief requested was an adjudication that the denial of her application for waiver of the licensing requirement, after she had failed the examination, was a violation of her constitutional rights, and an injunction permitting her to practice chiropractic in New York State. Petitioners answered and moved for summary judgment dismissing the complaint.

Respondent alleged Federal jurisdiction under the 14th and 5th Amendments, 28 U.S.C. sections 1331, 1343, 2201, and 2202 and 42 U.S.C. section 1983. The decisions of the Courts below apparently sustained jurisdiction under the 14th Amendment, 28 U.S.C. section 1331 and 42 U.S.C. section 1983.

The District Court awarded judgment in favor of the respondent, declaring that the failure of petitioners to offer her a hearing on her application for a waiver of the examination requirement was a denial of due process, even though no hearing was required by statute or regulation and none had been requested by respondent. The Court refused to order the issuance of a license or to grant any injunctive relief. The Court also rejected the defense that the action was time-barred and the defense of res judicata.

Petitioners appealed from so much of the judgment as dismissed the defenses of the statute of limitations and of res judicata and declared that petitioners had violated respondent's constitutional rights.

No cross appeal was filed by respondent.

The Circuit Court of Appeals for the Second Circuit affirmed, with Circuit Judge Lumbard dissenting. (Appendix A)

REASONS FOR GRANTING CERTIORARI

The Court should grant the motion for certiorari, pursuant to Rule 19, for the following reasons.

1. The Court of Appeals for the Second Circuit has decided an important question of Constitutional Law erroneously, and the question has not been decided by this Court.

2. The Court of Appeals for the Second Circuit has interpreted a New York State statute (Education Law section 6506) in a manner contrary to the interpretation of the same statute, on the same facts, by the highest court of the State of New York, and has violated accepted principles of Federal-State comity.

3. This Court, in its supervisory capacity, should review the interpretation of the doctrines of "res judicata" and the statute of limitations by the Circuit Court of Appeals for the Second Circuit in a manner which promotes unnecessary litigation and unduly prolongs it and which conflicts with the interpretation in the First Circuit.

Before addressing these three points, we want to emphasize the importance of this case, This is not merely a question of the right to continue practice of one chiropractor. The Court below has erred on a

point of Constitutional Law of great importance not only to petitioners but to all licensing authorities at all levels of government. It would require either a rigid adherence to specific licensure requirements, with no discretion to waive specific requirements in meritorious cases, (where the substance but not the letter of the requirement has been met); or else the licensing authority would be required to conduct a "due process" hearing whenever a candidate who was unable to meet a specific requirement asked for a waiver of it. This would deprive licensing authorities of the discretion to deal with special circumstances, or, if they wish to retain that discretion, would require the conduct of hundreds of "due process" hearings in factual situations which did not warrant them, as will appear more fully from the discussion of the facts of this case.

1. THE COURT OF APPEALS FOR THE SECOND CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW ERRONEOUSLY, AND THE QUESTION HAS NOT BEEN DECIDED BY THIS COURT.

The majority of the Court below has seriously misconstrued the Fourteenth Amendment and the effect of the decision of this Court in Board of Regents v. Roth (408 U.S. 564). It has carried its conception of "due process" too far, by holding that respondent should have been given a hearing before an impartial hearing officer on her application for waiver of an examination requirement after she had failed seven examinations. It has done so notwithstanding the following facts:

1. The determination denying respondent's application was made in 1971, prior to the decision in Roth.

2. No hearing was requested and respondent was represented by counsel at all stages of the administrative proceeding and in the State Court proceedings.

3. There are no disputed facts and the record is utterly devoid of any suggestion of any additional evidence which could be presented at a hearing.

Respondent's initial application for licensure was under the chiropractic licensing statute (Appendix F p. F1-F4). The constitutionality of these requirements for chiropractors to continue to practice in New York was litigated and sustained (Wasmuth v. Allen, 14 NY 2d 391, app. dism. 379 U.S. 11). Respondent did not contest the content or grading of her examinations. After she had exhausted the series of six special examinations for "grandfather" applicants, she was (and is) eligible to qualify by passing the regular examination. She tried once and failed five of the nine subjects (Appendix G).

At that point in time she had been afforded due process by the examinations themselves. Even the majority of the Court below agrees that "Doubtless procedural due process requirements would be satisfied were licensure made dependent solely upon passing a fairly written examination...." We submit that such was the case, and that any previous expectation of a continuing right to practice was, at this stage, terminated by respondent's own failure to pass the required examination.

Respondent then made a new application under the provisions of Education Law section 6506, applicable to all professions, authorizing petitioners to waive a specific licensing requirement if they are satisfied that it has been substantially met (Appendix F p. F5-F6).

The purpose of this provision, its interpretation by the New York courts, and its inapplicability to respondent's factual situation are discussed in point 2 post at pp. 15-17.

The facts upon which respondent based her application for waiver of the examination were not disputed. She did not request a hearing, none was required by statute and at the time of petitioners' final determination (Nov. 22, 1971) this Court had not yet decided Board of Regents v. Roth, 408 U.S. 564, 33 L. Ed 2d 548, 92 S. Ct. 2701; Perry v. Sinderman, 408 U.S. 593, 33 L. Ed. 2d 570, 92 S. Ct. 2694; and Morrisey v. Brewer, 408 U.S. 471, 33 L. Ed. 2d 484, 92 S. Ct. 2593. Even after those decisions, respondent did not request a reopening and a hearing. The facts of this case and similar cases do not require or justify a hearing. Neither does the Fourteenth Amendment. Although this Court has not addressed this specific question, the trend of its decisions in this area of due process indicates that no hearing was required.

There is a distinction between cases in which the State or a private party moves to terminate a right to liberty or property which it has conferred, and which the holder reasonably assumes to be a continuing right, and cases, such as this one, where the right is subject to the holder meeting and maintaining standards of eligibility. The former cases involve action of a disciplinary nature, and a due process hearing is required

(Perry v. Sinderman, supra; Morrisey v. Brewer, supra; Goss v. Lopez, 419 U.S. 565, 42 L. Ed. 2d 725, 95 S. Ct. 729). The latter type of cases involve failure to qualify for a right or to meet the standards for its continued exercise, without any allegation of misconduct or any aura of discipline or opprobrium. In these cases no such due process hearing is required (Board of Regents v. Roth, supra; Mathews v. Eldridge, 424 U.S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893; Leis v. Flynt, ___ U.S. ___ 58 L. Ed. 2d 717, 99 S. Ct. 698; Spady v. Mount Vernon Housing Authority, 34 NY 2d 573, 354 N.Y.S. 2d 945, 310 N.E. 2d 542, cert. den. 419 U.S. 983, 42 L.Ed. 2d 192, 95 S. Ct. 243).

The facts of this case place it in the latter group of cases, and the court below erroneously applied the rules of due process applicable to the former group of cases. The decision would seriously impair and unnecessarily prolong and complicate the State's exercise of its police power to protect citizens by insuring high standards of competence for professional licensees, and by using objective and fair licensing examinations to achieve that purpose.

2. THE COURT OF APPEALS FOR THE SECOND CIRCUIT HAS INTERPRETED A NEW YORK STATE STATUTE (EDUCATION LAW SECTION 6506) IN A MANNER CONTRARY TO THE INTERPRETATION OF THE SAME STATUTE, ON THE SAME FACTS, BY THE HIGHEST COURT OF THE STATE OF NEW YORK, AND HAS VIOLATED ACCEPTED PRINCIPLES OF FEDERAL-STATE COMITY.

Both the present statutory provisions and similar former statutes have been uniformly construed by petitioner and by the New York courts as applicable to extraordinary situations. They have been applied in the case of applicants from other jurisdictions and where a licensure requirement is substantially equivalent to, but does not meet the letter of the New York requirement. They have not been applied to situations where New York applicants have failed a licensure examination and have then sought to have it waived. This is undisputed and established in the record.

This interpretation has been endorsed by the New York Courts. In Matter of Erlanger (256 App. Div. 447) cited by the New York State Court of Appeals in its affirmance of the decision of the Appellate Division in favor of petitioners in this case, the Court said: "The Regents may not legally,

through the exercise of the remedial power conferred by this section, admit to the profession those who have not met the requirements the Legislature has established. If they err at all, it should be on the side of the protection of the public" (256 App. Div. at p. 447). And in this very case, on the undisputed facts, the Appellate Division noted: "Had the board waived the requirements on the record here, it would have abdicated its delegated responsibility, made our licensing provisions meaningless, and indirectly discriminated against the countless numbers who have taken this State's licensing examination and barely failed (43 AD 2d at p. 644). The Court of Appeals, New York's highest Court, unanimously affirmed that decision. Yet the Federal lower courts have totally ignored this interpretation of the key New York statute by respondents and by the New York Courts, and have substituted their view of what New York law should be for what it actually is, as Judge Lumbard noted in his dissent below. The general provision authorizing the waiver of specific licensure provisions in exceptional circumstances serves an equitable purpose. Its exercise, or the refusal to exercise it, is always subject to judicial review. It can reasonably be administered on the basis of written applications, without hearings, except as they may be required by specific factual disputes. It is not to be used as a means of avoiding specific requirements by applicants who have already demonstrated their inability

to meet them. The majority of the Court below has ignored the purpose and interpretation of the waiver statute. The result is a conflict between the majority decision of the Court below and the highest court of the State on the interpretation of this State statute, which should be resolved by this Court.

In addition to the fact that the general waiver statute does not apply to persons who have failed the New York licensing examination, the remaining grounds for waiver urged by respondent are also insufficient. New York has not accepted the pre-1972 licensing examinations given by the National Board of Chiropractic Examiners as the equivalent of the New York examination, nor has it accepted the standards for licensure in New Hampshire and Maine as the substantial equivalent of those in New York. These questions were raised in the New York court proceedings. Respondent offered no evidence to prove that the National Board examination or the out of state licenses were the substantial equivalent of passing the New York examination. The New York courts sustained petitioners determination on this point, and the defense of res judicata, even under the narrow rule in the Second Circuit, precludes further judicial review. The suggestion of the majority of the Second Circuit that the question whether or not respondent would be entitled to a waiver cannot be determined until after a hearing before an impartial hearing officer is

a further serious violation of Federal-State comity. It ignores the fact that this issue was litigated and settled in the State Courts.

Petitioners and other licensing boards have limited budgets and staff. During the 1970's eight new professions have been recognized in New York (speech pathology, audiology, occupational therapy, animal health technology, masseurs, certified social workers, physician's assistants, and specialist's assistants). Existing practitioners are required to meet specific licensing requirements to continue to practice. The decision of the court below would enable each of the hundreds of applicants in these and other groups licensed in the future to apply for a waiver of any requirements they cannot meet, and would require petitioners to conduct due process hearings on such applications regardless of any request for a hearing, and regardless of the existence of any real likelihood of success or factual issue to be determined. This would be a massive waste by the Federal courts of the resources of petitioner and other State and local licensing agencies, and it is not mandated by the Fourteenth Amendment as heretofore interpreted by this Court.

3. THIS COURT, IN ITS SUPERVISORY CAPACITY, SHOULD REVIEW THE INTERPRETATION OF THE DOCTRINE OF "RES JUDICATA" AND THE STATUTE OF LIMITATIONS BY THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT IN A MANNER WHICH PROMOTES UNNECESSARY LITIGATION AND UNDULY PROLONGS IT AND WHICH CONFLICTS WITH THE INTERPRETATION IN THE FIRST CIRCUIT.

The refusal of the Second Circuit to apply the statute of limitations or to apply the defense of "res judicata" in this and similar cases promotes unnecessary litigation and unreasonably prolongs it, and should be corrected by this Court.

The Second Circuit tolled the statute of limitations during the pendency of the State court litigation by respondent, citing its own prior decision in Lombard v. Board of Education (502 F 2d 631). At the same time the Second Circuit refused to apply the defense of "res judicata", because the respondent's allegations of a deprivation of her civil rights were not raised in the State courts, even though she was represented by an attorney at all stages of the State Court proceedings, and during prior administrative proceedings. The Second Circuit cited its own prior decisions in Ornstein v. Regan (574 F 2d 115) and Winters v. Lavine (574 F 2d 46) in support of this holding. The effect of these two rules, as the Second Circuit

itself admits, "allows a civil rights plaintiff to split his cause of action, litigate state claims in the State court, lose, and then start all over again in Federal court, asserting his constitutional or Federal civil rights claims arising out of the same facts" (Appendix A, note 1).

Although the Second Circuit cites "advancing the goals of federalism" as a justification of those rules, their practical effect, as well demonstrated by this case, is to enable the lower federal Courts to expand their jurisdiction, and review decisions of the highest State courts, and to enable litigants to unreasonably prolong litigation by successfully litigating the same case in first the State and then the Federal courts. These rules are apparently different in the First Circuit, which has stated that (in the absence of a tolling statute), "prior actions in the state courts do not toll the applicable statute of limitations" so as to extend the time within which a Civil Rights action may be commenced (Ramirez de Arellano v. Alvarez de Choudens, 575 F 2d 315 [1st Cir. 1978].

The Second Circuit's narrow interpretation of "res judicata" is contrary to the general interpretations of the rule, which would sustain the defense raised in the prior case (Preiser v. Rodriquez, 411 U.S. 475, 36 L. Ed. 2d 439, 93 S. Ct. 1827).

The adoption of the rule of the First Circuit, requiring litigants to raise Federal questions within the time permitted by reasonable statutes of limitations, and the adoption of the traditional interpretation of "res judicata" as applicable to issues which could have been raised, particularly in cases in which a litigant has been represented by an attorney, would help relieve the burden on the Federal courts, would eliminate unnecessary litigation, and would lead to the speedier resolution of important legal questions.

This Court should exercise its supervisory responsibility to resolve the conflict between the First and Second Circuits on the tolling of statutes of limitations, and should review the narrow interpretation of the rule of "res judicata" in the Second Circuit.

CONCLUSION

Wherefore, petitioners respectfully request that this petition for a writ of certiorari be granted.

Dated: September 11, 1979

Respectfully submitted,

ROBERT D. STONE
Deputy Commissioner
for Legal Affairs
Attorney for Petitioners

By Jean M. Coon

Donald O. Meserve
of Counsel

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 798—August Term, 1978.

(Argued March 20, 1979 Decided June 19, 1979.)

Docket No. 78-7637

MARY TOMANIO,

Plaintiff-Appellee,

—against—

THE BOARD OF REGENTS of the University of the State of New York; and EWALD NYQUIST, as Commissioner of Education and Chief Administrative Officer of the Education Department of the State of New York,

Defendants-Appellants.

Before:

OAKES and LUMBARD, *Circuit Judges,* and
BRIEANT, *District Judge.**

Appeal from summary judgment granted by Chief Judge Foley of the United States District Court for the Northern District of New York declaring that appellee's civil rights were violated by failure to grant a hearing prior to denying a waiver, under New York Education Law § 6506(5), of examination requirements for a license to continue the practice of chiropractic.

Affirmed.

DONALD O. MESERVE, Esq., Albany, New York (Jean M. Coon, Assistant Attorney General, State of New York, of counsel) *for Defendants-Appellants.*

VINCENT J. MUTARI, Esq., Garden City, New York, *for Plaintiff-Appellee.*

BRIEANT, *District Judge:*

Appellants (hereinafter "the Board of Regents" or "the Regents") seek to review a final judgment of the United States District Court for the Northern District of New York, James T. Foley, Chief Judge, which declared the Regents had violated plaintiff-appellee's civil rights. The Regents urge that the district court erred in holding that under the circumstances detailed below, appellee was entitled to an impartial hearing and statement of reasons for denial of her application for a waiver of state professional licensing requirements, as authorized by New York Education Law, § 6506(5). The Regents also claim the action should have been dismissed as *res judicata* by reason of a state court judgment, and that it was time barred. Finding no merit in any of these contentions, we affirm.

Effective July 1, 1963, the profession of chiropractic came under licensure by the Regents as a result of Chap-

* Honorable Charles L. Brieant, United States District Court for the Southern District of New York, sitting by designation.

ter 780, *et seq.* of the New York Laws of 1963, now codified as amended in §§ 6552, *et seq.* of Title 8 of the New York Education Law. Current practitioners of chiropractic on that date were permitted to qualify under the less stringent provisions of former § 6556 of the New York Education Law. This "grandfather" provision, as it was characterized below, required passing an examination in the practice of chiropractic, and if the applicant wished to use X-ray, a further examination in its use and effect. As to current practitioners, § 6506(5) authorized waiver of "education, experience and examination requirements for a professional license . . . provided the Board of Regents shall be satisfied that the requirements of such Article have been substantially met."

Plaintiff-appellee took the special examinations intended for current practitioners and passed all subjects except chemistry and X-ray. Chemistry was mandatory, although, as noted above, a limited license excluding use of X-ray can be obtained without a passing mark in that field. Computing her test scores in the manner permitted by the New York State Education Department's regulation on grade averaging [8 N.Y.C.R.R. § 73.3] appellee's failure in the science part of the examination which includes chemistry was measured by a margin of six tenths of one percent. She received passing scores in all other subjects.

Appellee, 58 years old at the time of her hearing in the district court, was licensed to practice her profession in Maine and New Hampshire, and has also passed an examination given by the National Board of Chiropractors. On September 21, 1971, she applied for a waiver under § 6506(5) quoted above. This application was denied November 19, 1971 without a hearing, and without any statement of reasons.

As to whether the federal claim is time barred, we conclude the district court did not abuse its discretion in determining that the statute of limitations was tolled for a period commencing January 26, 1972, when appellee filed a timely proceeding in the New York State Supreme Court pursuant to Article 78 of the New York CPLR to set aside the denial of waiver by the Regents as arbitrary and capricious and order issuance of a license to practice chiropractic. That petition, which pleaded no federal constitutional claims, was granted at Special Term of the New York Supreme Court, but the order was later reversed on appeal. It was not until November 20, 1975 that the New York Court of Appeals affirmed the order of the Appellate Division of the Supreme Court holding that as a matter of state law the Board of Regents had not abused its discretion in denying the waiver. *Tomanio v. Board of Regents*, 38 N.Y.2d 724 (1975), *aff'g. mem.* 43 App.Div.2d 643 (3rd Dept. 1973). Appellee was diligent in pressing her claims. Her state litigation was initially successful. It was not until after the three year statute of limitations had expired that the state litigation was finally resolved against appellee. She filed this action on June 25, 1976, some seven months later. This Court has recognized the propriety, under such circumstances, of tolling the statute in the interests of advancing the goals of federalism. *Williams v. Walsh*, 558 F.2d 667, 674 (2d Cir. 1977); *Ornstein v. Regan*, 574 F.2d 115, 119 (2d Cir. 1978).

As the federal constitutional claim was not raised or litigated in the state proceeding, it was not barred in the federal court by the doctrine of *res judicata*.[1] *Ornstein v.*

1 Nor are we, as the dissent suggests, second guessing twelve New York appellate judges, which, were it so, would indeed be "offensive to accepted principles of federal-state comity, common

Regan, supra at 117; *Winters v. Lavine*, 574 F.2d 46 at 56-58 (2d Cir. 1978) and cases therein cited.

By its plain meaning, the waiver provision of New York State Education Law § 6506(5) is applicable to appellee's factual situation. That this is true was implicitly conceded in the opinions in appellee's state court proceedings cited above. This being so, before such a waiver could be denied to one already practicing her profession, appellee was and is, under the circumstances of this case, entitled to an adjudicative hearing before the Board of Regents, or its duly designated impartial hearing officer, and if waiver be denied, is also entitled to a statement of reasons for the denial.

Doubtless procedural due process requirements would be satisfied were licensure made dependent solely on passing a fairly written examination reasonably related to the required skills, with those who flunk cast out of their profession. In this case, those who flunk may be admitted nonetheless by waiver, the granting or withholding of which is entrusted to the Regents on statutory criteria as broad and vague as that found in *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963). Where, as here, such broad discretionary power is granted to admit or deny entrance or continuance in a learned profession, it "must be construed to mean the exercise of a discretion to be exercised after fair investigation with such notice, hearing and opportunity to answer for the applicant as would constitute due process." *Goldsmith v. Board of Tax Appeals*, 270 U.S. 117, 123 (per Ch. Justice Taft, 1926).

sense and judicial modesty." The rule of this Court, stated in *Lombard v. Board of Education*, 502 F.2d 631, 635 (2d Cir. 1974) allows a civil rights plaintiff to split his cause of action, litigate state claims in the state court, lose, and then start all over again in federal court, asserting his constitutional or federal civil rights claims arising out of the same facts. Because, as in *Lombard*, appellee did not raise her federal constitutional rights in the state courts, none of the twelve New York judges passed on them.

The adjudicative fact to be determined in considering whether to grant a waiver is not whether Dr. Tomanio may practice her profession in New York, as she can do in Maine and New Hampshire, as a matter of grace from her sovereign or at the whim of the Regents. Rather, it is whether, notwithstanding her narrow failure of the examination, she "substantially" meets licensure requirements. Of course the state legislature need not have provided for any waiver of the examination. But once it did so, denial of the waiver implicates procedural due process rights. An adjudicative fact of such significance to appellee's interests cannot, in logic or constitutionally, be resolved without a hearing before an impartial fact finder, followed by a statement of reasons in the event of denial. This is so because the interest of a current practitioner of the healing arts in the continued practice of her profession is a property right within Fourteenth Amendment protection as defined in *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972), and may also be "liberty" within the same provision. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). See also, *Board of Curators, University of Missouri v. Horowitz*, 435 U.S. 78 (1978) and Friendly, "Some Kind of Hearing" 123 U.Pa.L.Rev. 1267, 1296-97 (1975). The judgment appealed from merely declares such right. Whether, following an impartial hearing, appellee would be entitled to a waiver was not determined below, nor could it be in the absence of such hearing.[2]

2 The dissent notes that "plaintiff does not suggest any reason why the Board would or should grant a waiver." A logical argument can be made that since Dr. Tomanio is licensed in two other states, has practiced successfully for so many years, and passed her National Boards, she might be able to convince an impartial hearing officer that she "substantially" meets the requirements of the statute, notwithstanding her failure of the examination by six-tenths of one percent. We express no opinion on the point except that Dr. Tomanio's right to due process would seem, under these facts, independent of her likelihood of success at a hearing.

LUMBARD, *Circuit Judge* (dissenting):

I would reverse the judgment of the district court and dismiss the complaint.

Plaintiff brought this action in the United States District Court for the Northern District of New York, contending that defendants' refusal to issue a license to practice chiropractic in the State of New York deprived her of property without due process in violation of the Fourteenth Amendment. She requested an injunction directing that she be permitted to practice chiropractic in New York. Defendant answered and moved for summary judgment dismissing the complaint.

The district court awarded judgment for the plaintiff, declaring that defendant's failure to provide a hearing on plaintiff's application for a waiver of the examination requirement deprived her of her livelihood without due process. The court did not grant any affirmative relief, but issued a declaratory judgment stating that the plaintiff's due process rights had been violated and that she was entitled to an administrative hearing. Defendants appealed.

New York's chiropractic licensing statute was enacted as Chapter 781 of the Laws of 1963, to take effect July 1, 1963. Plaintiff had been practicing chiropractic since 1958. The statute provides general licensing requirements for new applicants, including, inter alia, examination requirements. The statute also includes a generous "grandfather" provision, allowing an alternative method of qualifying for persons already practicing chiropractic on the effective date of the statute. Plaintiff has taken the examinations under the less rigorous provisions of the grandfather clause on six occasions, the last time in 1971, but has never achieved a total accumlated score sufficient to pass even under this lesser standard. Plaintiff has also

taken and failed the regular licensing examination. She nevertheless remains eligible to take and pass the regular licensing examination.

After failing to pass the required examination on her seventh attempt, plaintiff applied for a waiver of the examination requirement under a general provision of the Education Law, applicable to all professions, allowing the Board of Regents, in its discretion, to waive specific requirements for licensing "provided the Board of Regents shall be satisfied that the requirements . . . have been substantially met." Education Law Section 6506, subdivision 5. This statute makes no provision for a hearing on an application for a waiver. The Board of Regents, after considering plaintiff's request for a waiver, denied her application.

Plaintiff then brought a proceeding in the state courts pursuant to Article 78 of the New York Civil Practice Law and Rules, seeking to compel the Board of Regents to waive the examination requirement in her case and to issue her a license. Supreme Court, Albany County, entered judgment for plaintiff, without opinion. The Appellate Division, Third Department, reversed in a unanimous opinion, on the ground that the authority to give a waiver is "permissive, not mandatory":

> "A review of the applicant's record on the chiropractic examinations and the fact that she failed seven examinations in as many attempts provides ample justification for the Regents' failure to exercise the discretion granted to them and removes any doubt that their action was arbitrary or capricious . . . had the board waived the requirements on record here, it would have abdicated its delegated responsibility, made our licensing provisions meaningless, and indirectly discriminated against countless numbers who

have taken this State's licensing examinations and barely failed." 43 App. Div. 2d 643 (1973).

The Court of Appeals affirmed the Appellate Division in a second unanimous opinion, on the ground that "the refusal of the Board of Regents to waive the examination required by statute was not, as a matter of law, an abuse of discretion." 38 N.Y. 2d 724 (1975). Plaintiff then brought suit in federal court and obtained the declaratory judgment on appeal here.

The Fourteenth Amendment requires that no state "deprive any person of life, liberty, or property, without due process of law." Courts have construed this clause to mean that when the state takes a person's property, it must adhere to recognized principles of substantive and procedural law. Thus when any significant property interest, such as a person's entitlement to earn a living as a chiropractor, is taken, that person is entitled to a hearing and a right to be heard. The type of hearing that is required in a particular situation depends on all the circumstances. I would hold with the New York Court of Appeals that in the context of professional licensing, a regularly and fairly administered examination procedure satisfies plaintiff's due process right to be heard. Here the plaintiff does not challenge the fairness of the examination itself, the way in which it was given, or the way in which it was graded.

I do not believe that due process requires, in addition to a fair examination, a special hearing to determine whether the examination should be waived for applicants who have failed it. Where a law or regulation, such as the regulation setting up minimum passing grades here, has been validly promulgated for a legitimate public purpose and the complainant admittedly falls within the am-

bit of that regulation, enforcement without exceptions does not violate due process.

Even after taking account of the importance of plaintiff's property interest, the public interest in an objective and impartial method for certifying chiropractors fully justifies exclusive reliance on an examination procedure such as New York provides. Although we may sympathize with the plight of those who fail qualifying professional examinations, those examinations are required for a reasonable and valid public purpose: to determine who is qualified to practice a particular profession. In this case, the qualifying examination which the appellant has repeatedly failed is the principal means for protecting a public which cannot by itself adequately verify the credentials of those chiropractors they turn to in time of need.

That the State of New York has gone beyond the requirements of due process, as fulfilled by a fair examination, and has provided for the possibility of a waiver in the discretion of the Board of Regents, should not change the result. The addition of a waiver procedure which is not required by due process does not require a further hearing where a further hearing would not otherwise be required. Plaintiff, moreover, has not shown any unfairness either in the processing of the examination or in the decision to deny her a waiver. Plaintiff does not suggest any reason why the Board would or should grant a waiver. In short, she has not been deprived of any right by reason of not being allowed to appear before the Board.

Plaintiff might have made out a case on her right to receive a waiver, or at least on her right to a hearing before one was denied, had she shown that the state had granted waivers to others who had failed the examination

and that there were no discernible standards for distinguishing her from those who had received the waivers. But plaintiff has made no such showing. In fact, she has not shown us one case where anyone who has failed the examination has been given a waiver relieving them of the consequences. Indeed, although the waiver provision theoretically includes waivers for failure to pass the examination, it is more clearly aimed at waiver of requirements less directly related to competency, such as residence or citizenship. Accordingly, that the letter of the law was applied to appellee as the legislature contemplated does not make out arbitrary and capricous action amounting to a violation of due process.

Finally, in the absence of a violation of due process (such as does not exist here), I do not think that the federal courts should interfere with state licensing procedures—especially to require the state to hold a hearing in a case where no good reason is shown for holding one.

If we were to affirm the district court's notion that the plaintiff is entitled to a hearing, we would be suggesting resort to the federal courts whenever a state agency fails to license someone who fails to qualify. We would not only interfere with what is exclusively a state function, we would also encourage frivolous and needless litigation.

If New York opts for strict observance of its licensing laws it is not the proper business of the federal courts to decide how, if at all, strict observance should be tempered by a waiver procedure, so long as the administration of the state system does not offend equal protection. For one, two or even three federal judges to second-guess twelve New York appellate judges on a question of this nature is offensive to accepted principles of federal-state comity as well as to common sense and judicial modesty.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

MARY TOMANIO,

Plaintiff,

-against- 76-CV-263

THE BOARD OF REGENTS of the University of the State of New York; and EWALD NYQUIST, as Commissioner of Education and Chief Administrative Officer of the Education Department of the State of New York,

Defendants.

APPEARANCES: OF COUNSEL:

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JAMES T. FOLEY, D. J.

MEMORANDUM-DECISION and ORDER

Plaintiff Mary Tomanio commenced this action premised on the Fourteenth Amendment and 42 U.S.C. § 1983 on June 25, 1976, invoking the jurisdiction of this Court pursuant to 28 U.S.C. §§ 1331 and 1343. The ultimate relief that plaintiff seeks is an order directing the defendants Board of Regents of

the State of New York and Ewald B. Nyquist, then Commissioner of Education and Chief Administrative Officer of the Education Department of the State of New York, to waive examination requirements and issue her a license to practice chiropractic in the State of New York.

Presently before the Court is plaintiff's motion for a preliminary injunction permitting plaintiff to practice her chosen profession in the State of New York and enjoining the County Court of Dutchess County, New York, from proceeding with a pending criminal prosecution for the practice of chiropractic without a license until such time that this Court rules on the merits of plaintiff's complaint. Also before the Court is defendants' motion for summary judgment in their favor on the grounds of, inter alia, res judicata, failure to state a claim upon which relief can be granted, and statute of limitations.

FACTUAL BACKGROUND

Plaintiff has been practicing chiropractic in this state since 1958. In 1963, at the behest of chiropractors, New York State enacted a licensing scheme for the practice of chiropractic. See N.Y. Times, April 30, 1963, at 37, col. 1.

On seven separate occasions between 1964 and 1971 plaintiff attempted to satisfy the chiropractic licensing examination requirement pursuant to a "grandfather" provision applicable to those, like plaintiff, who were then practicing in New York State.

See Ch. 780, §1 [1963] N.Y. Laws 1282-1285 (McKinney) (former N.Y. Education Law § 6556). Although plaintiff failed to achieve the necessary grades for licensing, her failure was by a very narrow margin. See Tomanio v. Board of Regents, 43 App. Div. 2d 643 (3d Dep't 1973)(mem.), aff'd mem., 38 N.Y. 2d 724 (1975). Plaintiff failed one part of the licensing examination, chemistry by 8 points. Through use of the Education Department's regulation on averaging, 8 N.Y. C.R.R. § 73.3, plaintiff's failure in the science part of the examination, which includes chemistry, was by only .6 of 1%. Plaintiff received passing scores in all other subjects. In 1972, subsequent to her inability to pass the examinations given under the "grandfather" provision of the new statute, plaintiff took the regular licensing examination for chiropractors and again failed to attain a passing score. See N.Y. Education Law § 6554(4) (McKinney 1972).

Plaintiff is now over 58 years old and is the sole supporter of her family. She is licensed to practice chiropractic in Maine and New Hampshire and has passed an examination given by the National Board of Chiropractors. On September 21, 1971, plaintiff applied to defendant Board of Regents for waiver of the examination requirement pursuant to New York Education Law § 6506(5) (McKinney 1972). Under § 6506(5) the Board of Regents, in their discretion, can waive education, experience, and examination requirements if it is satisfied that the requirements for a professional license have been "substantially met." After such a waiver, the New York State Education Department would be authorized to issue a license.

By letter dated November 22, 1971, plaintiff was informed that the Board of Regents had voted on November 19, 1971, to deny her application for waiver of the examination requirement. Thereafter, by petition verified on December 10, 1971, and order to show cause signed January 26, 1972, plaintiff commenced an Article 78 proceeding attacking the decision of the Board of Regents as arbitrary and capricious and seeking an order directing the New York State Education Department and the Board of Regents to issue her a license to practice chiropractic in the State of New York.

Plaintiff's petition was granted at Special Term of the Supreme Court of the State of New York, but that order was reversed by the Appellate Division, Third Department. On November 20, 1975, the New York State Court of Appeals affirmed the order of the Appellate Division holding that as a matter of law the Board of Regents had not abused their discretion in denying plaintiff's application. Tomanio v. Board of Regents, 38 N.Y.2d 724 (1975), aff'g mem. 43 App. Div. 2d 643 (3d Dep't 1973)(mem.). See Generally Marburg v. Cole, 286 N.Y. 202 (1941).

Then, on June 25, 1976, plaintiff commenced the present action in this Court premised on violation of the due process clause of the Fourteenth Amendment. Thereafter, and now pending in the County Court of Dutchess County, a criminal action was initiated against plaintiff charging her with the unauthorized practice of chiropractic. See N.Y. Education Law § 6512 (McKinney Supp. 1977).

DISCUSSION

A

As previously noted, defendants move for summary judgment and dismissal of plaintiff's complaint on the ground of res judicata. This portion of defendants' motion is based on the prior Article 78 proceeding brought by plaintiff in the state courts. The Court of Appeals Second Circuit, however, has held that a prior state court proceeding will not bar a federal court in a civil rights action from considering matters that were not actually litigated and determined in the prior proceeding. See, e.g., Ornstein v. Regan, 574 F.2d 115 (2d Cir. 1978); Graves v. Olgiati, 550 F.2d 1327 (2d Cir. 1977); Lombard v. Board of Education, 502 F.2d 631 (2d Cir. 1974), cert. denied, 420 U.S. 976 (1975).

The record on appeal and briefs submitted to the New York State Court of Appeals clearly establish that plaintiff did not raise a due process claim before the courts of the State of New York. Therefore, principles of res judicata do not bar plaintiff's present action under the Civil Rights Act alleging deprivation of her constitutional right to due process of law. This same reasoning should apply to plaintiff's assertion of a claim brought directly under the Fourteenth Amendment with jurisdiction predicated on 28 U.S.C. § 1331.

B

Defendants also challenge plaintiff's complaint on the ground that it fails to state a claim upon which relief can be granted. Defendants contend that no hearing is required before the Board of Regents when it is asked to waive a specific licensing requirement by an individual who, prior to the advent of licensing in the State of New York, had

previously been permitted to practice chiropractic in this state.

Due process is a flexible concept, the contours of which are shaped by the circumstances of each particular situation. Mathews v. Eldridge, 424 U.S. 319, 334 (1976). Turning to the particular situation that is before this Court, it is evident that plaintiff has a constitutional right to practice her profession free from unreasonable governmental interference. Green v. McElroy, 360 U.S. 474, 492 (1959). While this is true, however, the imposition of a new requirement for the continued practice of that calling, in and of itself, does not offend the Constitution. Gray v. Connecticut, 159 U.S. 74 (1895); Wasmuth v. Allen, 14 N.Y. 2d 391, appeal dismissed, 379 U.S. 11 (1964)(per curiam). See also Bell v. Burson, 402 U.S. 535, 539 (1971).

In my judgment, the practice of chiropractic in this state, prior to the licensing scheme enacted in 1963, is a "property" interest and "liberty" interest that cannot be taken away by the state except in accordance with principles of due process as embodied in the Fourteenth Amendment. See, e.g. Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972); Meyer v. Nebraska, 262 U.S. 390 (1923); Huntley v. Community School Board, 543 F.2d 979, 986 n.8 (2d Cir. 1976), cert. denied, 430 U.S. 929 (1977); Hecht v. Monaghan, 307 N.Y. 461 (1954). Furthermore, in determining whether to waive the examination requirements in plaintiff's behalf, the Board of Regents was called upon to ascertain "the existence of certain past or present facts upon which a decision is to be made and rights and liabilities determined." Hecht v. Monaghan, supra, 307 N.Y. at 469.

Under these circumstances, it is my opinion that before the Board of Regents decided to deny plaintiff's application for waiver of the examination requirement and licensure, a determination that is predominantly adjudicative, a hearing should have been held. See generally Weinberger v. Hynson, Westcott & Dunning, Inc. 412 U.S. 609, 637 (1973)(Powell, J., concurring). In my judgment, it is not significant under the facts of this case that pursuant to New York's statutory scheme the Board of Regents is given the authority to deny or grant a waiver of statutory licensing requirements rather than authority to withdraw or sustain the grant of a state license. The last action taken by the state with regard to plaintiff's ability to practice chiropractic in New York was contained in a letter from the Board of Regents dated November 22, 1971. By that letter, which denied plaintiff's application for waiver of examination requirements and licensure to practice chiropractic the Board of Regents terminated a "property" interest and "liberty" interest protected by the Fourteenth Amendment -- plaintiff's right to continue to practice her chosen profession.

It is not this Court's role to substitute its judgment for that of the Board of Regents in this matter. Yet, as the New York State Court of Appeals has stated, "it is no answer to say that in [t]his particular case due process of law would have led to the same result." Hecht v. Monaghan, supra, 307 N.Y. at 470. Although it does not appear that plaintiff requested a hearing or that a hearing is contemplated by statute, some form of hearing should have been held under

the circumstances of this case. Id. at 468. This decision, however, should not be misunderstood to require some form of hearing in every situation where an individual seeks a waiver of licensing requirements. For instance, a person who was not practicing chiropractic in New York prior to 1963 presents a totally different situation than that which is before this Court. In addition, it should be noted that there is no indication in the record that the burden to be borne by the state in providing some form of hearing to applicants such as the plaintiff would be of insurmountable magnitude. See Mathews v. Eldridge, supra, 424 U.S. at 335.

Furthermore, I believe that if, after a hearing as discussed above, a person is denied the right to continue in the practice of his or her chosen calling, then that person is entitled to a formal written statement of reasons articulated by the Board of Regents setting forth the basis for that determination. See Hornsby v. Allen, 326 F.2d 605, on rehearing, 330 F.2d 55 (per curiam) (5th Cir. 1964); Davis v. Clyne, 56 App. Div. 2d 692 (3d Dep't 1977)(mem.). See also Davis v. Clyne, 58 App. Div. 2d 947 (3d Dep't 1977) (mem.), leave to appeal denied, 44 N.Y.2d 646 (1978).

Therefore, in my judgment, this portion of defendants' motion is without merit and must be denied. See Schware v. Board of Bar Examiners, 353 U.S. 232, 238-39 (1957); Barnes v. Merritt, 376 F.2d 8 (5th Cir. 1967); Birnbaum v. Trussell, 371 F.2d 672 (2d Cir. 1966).

Defendants' motion for summary judgment also sets forth the ground of statute of limitations. A statute of limitations reflects legislative wisdom in selecting a period within which to commence an action that balances the interests of preserving meritorious claims, discouraging frivolous claims, and preventing the prejudice and surprise attendant to the revival of stale claims. Federal law does not provide a specific statute of limitations for actions brought pursuant to 42 U.S.C. § 1983 or directly under the Fourteenth Amendment. Under such circumstances the applicable period of limitations will usually be taken from the most analogous statute of limitations provided for by state law. E.g., Johnson v. Railway Express Agency, Inc. 421 U.S. 454 (1975); Swan v. Board of Higher Education, 319 F.2d 56 (2d Cir. 1963).

It has long been held that New York's three-year time period for actions "to recover upon a liability, penalty or forfeiture created or imposed by statute," N.Y. C.P.L.R. § 214(2) (McKinney Supp. 1977), governs civil rights actions brought pursuant to 42 U.S.C. § 1983 and its jurisdictional counterpart 28 U.S.C. § 1343. E.G., Meyer v. Frank, 550 F.2d 726 (2d Cir.), cert. denied, 434 U.S. 830 (1977); Kaiser v. Cahn, 510 F.2d 282 (2d Cir. 1974); Romer v. Leary, 425 F.2d 186 (2d Cir. 1970).

Assuming arguendo that plaintiff has stated a claim directly under the Fourteenth Amendment with jurisdiction grounded in 28 U.S.C. § 1331, see Turpin v. Mailet, Slip Op. 3243 (2d Cir. June 5, 1978) (en banc), I would apply the same statute of limitations that governs

plaintiff's claim brought under the Civil Rights Act. See id. at 3271; Cestaro v. Mackell, 429 F. Supp. 465 (E.D.N.Y. 1977).

Furthermore, the Court of Appeals, Second Circuit, has applied the same statute of limitations to equitable as well as legal remedies sought under the Civil Rights Act. Williams v. Walsh, 558 F.2d 667 (2d Cir. 1977). But see Ornstein v. Regan, supra, 574 F.2d at 119.

In my judgment, New York's three-year statute of limitations found in N.Y. C.P.L.R. § 214(2) governs plaintiff's claim asserted in this lawsuit. As is evident from the pleadings, plaintiff's claim arose in November 1971 when her application for waiver of the examination requirement and licensure was denied by the Board of Regents. See Ornstein v. Regan, supra, 574 F.2d at 119. Although it may appear that plaintiff's claim is time-barred, this does not end a court's inquiry into the timeliness of a claim.

Notwithstanding the passage of time since the conduct that plaintiff complains of, her action may still be timely and her claim saved if circumstances exist that would have tolled the running of the statute of limitations. In Mizell v. North Broward Hospital District, 427 F.2d 468 (5th Cir. 1970), the Court of Appeals, Fifth Circuit, posited that the statute of limitations applicable to a civil rights action is tolled during the pendency of administrative and judicial proceedings aimed at vindicating a plaintiff's state-created rights. As of yet, however, the Court of Appeals, Second Circuit, has failed to address itself to this issue.

E.g., Williams v. Walsh, supra, 558 F.2d at 673 n.5; Meyer v. Frank, supra, 550 F.2d at 729 n.8. But see Ornstein v. Regan, supra, 574 F.2d at 119.

In my judgment, the present overburdening of the federal courts and the increased filings of civil rights complaints are factors that mitigate in favor of encouraging the utilization of effective and feasible administrative and judicial remedies, which exist under state law, in certain situation. See, e.g., Moore v. City of East Cleveland, 431 U.S. 494, 521 (1977) (Burger, C.J., dissenting); Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969), cert. denied, 400 U.S. 841 (1970).

Although a toll of the statute of limitations in civil rights actions should not be routinely recognized, see, e.g., Johnson v. Railway Express Agency, Inc., supra, 421 U.S. at 454; Prophet v. Armco Steel, Inc., 575 F.2d 579 (5th Cir. 1978)(per curiam); Meyer v. Frank, supra, 550 F.2d at 726, I believe that under the facts of this case a toll is justified and would be in accordance with federal policy considerations under the Civil Rights Act.

Plaintiff's Article 78 proceeding was brought in state court almost immediately after the decision by the Board of Regents to deny her application. That proceeding was premised entirely on state-created rights and in pursuit of state-created remedies. It was not until November 20, 1975, that plaintiff's petition was dismissed by the New York State Court of Appeals. Thereafter, on June 25, 1976, plaintiff commenced the present action for vindication of her federally secured rights.

In my judgment, it cannot be said that plaintiff has slept on her rights. See Johnson v. Railway Express Agency, Inc., supra, 421 U.S. at 466.

Therefore, this Court holds, under the reasoning expounded in Mizell v. North Broward Hospital District, supra, that plaintiff's claim of deprivation of federally protected rights is not time-barred; the period of limitation having been tolled during the pendency of plaintiff's Article 78 proceeding in the state courts. Thus, this portion of defendants' motion for summary judgment must be denied.

D

Having canvassed all of the pleadings in this lawsuit, it is my opinion that defendants have not raised a viable defense to this action. See Answer, filed July 23, 1976; Roth v. Board of Regents, 310 F. Supp. 972, 974-75 (W.D. Wis. 1970), aff'd, 446 F. 2d 806 (7th Cir. 1971), rev'd on other grounds, 408 U.S. 564 (1972). Furthermore, inasmuch as there is no genuine dispute as to any material fact between the parties and because a motion for summary judgment searches the record, it is clear to my mind that plaintiff is entitled to judgment on her claim brought pursuant to the Civil Rights Act as a matter of law for the reasons set forth in Part B above. See 6 J. Moore, Federal Practice ¶ 56.12 (2d ed. 1977); 10 C. Wright & A. Miller, Federal Practice and Procedure § 2720 (1973).

Therefore, due to the fact that the Court has reached a final determination of plaintiff's claim on the merits, plaintiff's motion for a preliminary injunction is now moot. The only issue remaining is that of appropriate relief.

By her complaint, plaintiff seeks declaratory and injunctive relief as well as such other relief as this Court may deem proper. More specifically, plaintiff seeks a declaration, under the Federal Declaratory Judgments Act, U.S.C. §§ 2201-2202, that plaintiff's constitutional right to due process was violated by the Board of Regents' denial of her application for waiver of the examination requirement; an order directing the Board of Regents to grant her application for waiver of the examination requirement; and a preliminary injunction permitting plaintiff to practice her chosen profession pending trial and final judgment on the merits of her claim.

Plaintiff's request for a preliminary injunction is now moot. In addition, I believe it would be improper for me in fashioning relief to order the Board of Regents to grant plaintiff's application for a waiver of the examination requirement or to order the New York State Education Department to issue her a chiropractic license. See Wicker v. Hoppock, 73 U.S. (6 Wall.) 94, 99 (1867). Such relief could not be justified and would not be a proper remedy for vindication of the constitutional rights violated under the circumstances presented herein. See, e.g. Hornsby v. Allen, supra, 330 F.2d at 56.

Therefore, under the circumstances presented, the only relief that plaintiff seeks and to which she is entitled is a declaration that her constitutional right to due process of law under the Fourteenth Amendment was violated by the absence of some form of hearing prior to the Board of Regents' denial of her application for waiver of the examination requirement.

CONCLUSION

Accordingly, it is hereby declared and adjudged that under the due process clause of the Fourteenth Amendment plaintiff's federally secured rights were violated by defendant Board of Regents' decision not to waive the chiropractic examination requirement in plaintiff's behalf, which determination was made without affording the plaintiff some form of hearing and which was made without a formal written statement of reasons indicating why she was not granted such a waiver. All other relief requested by the plaintiff is hereby denied.

Consequently, defendants' motion for summary judgment is denied in its entirety and plaintiff's motion for a preliminary injunction is denied and dismissed as moot in light of the rulings of the Court herein.

The Clerk is hereby directed to enter a final and declarative judgment in favor of plaintiff Mary Tomanio on her claim brought under the Civil Rights Act in accordance with this memorandum-decision.

It is so Ordered.

Dated: August 25, 1978
Albany, New York

s/James T. Foley
United States District Judge

In the Matter of MARY TOMANIO, Appellant, v BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK et al., Respondents.

Argued October 21, 1975; decided November 20, 1975

Physicians and surgeons — license to practice chiropractic — petitioner, who had been practicing chiropractic in New York since 1958, had taken licensing examination on seven different occasions subsequent to enactment of chiropractic licensing law, had passed all subjects except chemistry, and had average of 74.4 in group of subjects containing chemistry, while passing mark therein was average of 75, applied to Board of Regents for licensure pursuant to section 6506 (subd [5]) of Education Law, providing that board might waive prescribed education, experience and examination requirements if it was satisfied said requirements had been substantially met — in article 78 proceeding, contention by her that board acted arbitrarily and capriciously when it denied her application — order of Appellate Division which dismissed her petition affirmed — board's refusal to waive examination required by statute was not, as matter of law, abuse of discretion.

Matter of Tomanio v Board of Regents of Univ. of State of N. Y., 43 AD2d 643, affirmed.

APPEAL from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered November 30, 1973, which (1) reversed, on the law and the facts, a judgment of the Supreme Court at Special Term (DE FOREST C. PITT, J.), entered in Albany County in a proceeding pursuant to CPLR article 78, granting a petition for a judgment directing the issuance to petitioner of license to practice

chiropractic in New York State, and (2) dismissed the petition. Under the Regulations of the Commissioner of Education, the passing mark for each subject of the chiropractic licensing examination was 75, except that the passing mark in all subjects of any one group of subjects was an average of 75, provided that, in determining the average, no grade less than 65 and only one grade less than 75 was accepted (8 NYCRR 73.3). Under section 6506 (subd [5]) of the Education Law, the Board of Regents might "Waive education, experience and examination requirements for a professional license prescribed in the article relating to the profession, provided [it] shall be satisfied that the requirements of such article have been substantially met". Petitioner had been practicing chiropractic in New York since 1958, had taken the licensing examination on seven different occasions subsequent to the enactment of the chiropractic licensing law (L 1963, ch 780), had passed all subjects except chemistry, in which she received a mark of 67, and had an average of 74.4 in the group of subjects containing chemistry. She applied to the board for licensure pursuant to section 6506 (subd [5]) of the Education Law, alleging as reasons why it should exercise its statutory power, that she had failed by a narrow margin; that her failure was caused by failing a science not utilized in chiropractic, and that she had qualified for practice in two other States, had passed an examination given by the National Board of Chiropractic Examiners, and had 13 years of practice in New York. In her present proceeding she contended that the board acted arbitrarily and capriciously when it denied her application.

Vincent J. Mutari for appellant.

Donald O. Meserve and *Robert D. Stone* for respondents.

Order affirmed, without costs. The refusal of the Board of Regents to waive the examination required by statute was not, as a matter of law, an abuse of discretion. (Education Law, § 6506, subd [5]; § 6554, subd [4]; see, also, *Matter of Levi v Regents of Univ. of State of N. Y.*, 256 App Div 444, affd 281 NY 627.)

Concur: Chief Judge BREITEL and Judges JASEN, GABRIELLI, JONES, WACHTLER and FUCHSBERG. Taking no part: Judge COOKE.

APPENDIX D

DECISION OF THE APPELLATE
DIVISION OF THE SUPREME COURT
OF THE STATE OF NEW YORK,
THIRD DEPARTMENT

In the Matter of Mary Tomanio, Respondent, v. Board of Regents of the University of the State of New York et al., Appellants. - Appeal from a judgment of the Supreme Court, Albany County, which granted petitioner's application, in a proceeding pursuant to CPLR article 78, seeking to direct the Board of Regents to issue her a license to practice chiropractic in New York State. The petitioner has been practicing chiropractic in this State since 1958. In 1963, by chapter 780 of the Laws of 1963, this State adopted its first chiropractic licensing law and section 6556 of the Education Law became applicable to those who, like the petitioner, were then practicing in the State. In 1971, acting upon the recommendation of the Joint Legislative Committee to revise and simplify the Education Law, the Legislature amended and recodified the then existing law by enacting chapter 987 of the Laws of 1971. Sections 6554 and 6506 of the Education Law are the pertinent sections here. It is important to note that there is no claim here that the amendments in any way diminished or impaired the "grandfather" provisions or any other rights acquired by the petitioner under the original act. Since 1963, the petitioner has continued

her practice and has taken the examination for admittance as required by section 6554 of the Education Law on seven different occasions and has failed to achieve the necessary grade on each opportunity. She does not question the make-up of the examination, nor does she take issue with the grading thereof. Petitioner does contend that her final grade, as computed under 8 NYCRR 73.3, is such that when coupled with her experience, constitutes substantial compliance and that, therefore, the board abused its discretion by not waiving the examination result as she asserts they could and should do under subdivision (5) of section 6506 of the Education Law. As an alternative to receiving a passing grade of 75 in each subject in order to pass the examination, the regulations (8 NYCRR, 73.3) provide in substance that any candidate who passes all required subjects but one, may average the highest grades attained in each subject (passed) with the highest grade obtained in the failed subject and if the average is 75 or more, the candidate shall be deemed to have passed the examination. Using this procedure, petitioner's grade is 74.4. Subdivision (5) of section 6506 of the Education Law provides as follows: "In supervising, the board of regents may: * * * (5) Waive education, experience and examination requirements for a professional license prescribed in this article relating to the profession, provided the board of regents shall be satisfied that the requirements of such

article have been substantially met". It should be remembered that in an article 78 proceeding the court may not substitute its own judgment for that of the board and may inquire only as to whether the record shows facts which leave no possible scope for the reasonable exercise of discretion (Matter of Mid-Is. Hosp. v. Wyman, 25 AD 2d 765, 767). There must be a clear showing that petitioner has established a distinct right to the relief sought (Matter of Stracquadanio v. Department of Health, 285 N.Y. 93). Subdivision (5) of section 6506 of the Education Law is permissive, not mandatory. In its delegation of responsibility in the licensing area, the Legislature sought to provide the Regents with the means of minimizing hardship while at the same time providing overall protection for the public by establishing minimum standards of competence. A review of the applicant's record on the chiropractic examinations and the fact that she failed seven examinations in as many attempts provides ample justification for the Regents' failure to exercise the discretion granted to them and removes any dqubt that their action was arbitrary or capricious. Had the board waived the requirements on the record here, it would have abdicated its delegated responsibility, made our licensing provisions meaningless, and indirectly discriminated against the countless numbers who have taken this State's licensing examinations and barely failed. The petitioner has failed to meet her burden and the board's action was thoroughly justified. Judgment reversed, on the law and the facts, and petition

dismissed, without costs. Staley, Jr., J.P., Greenblott, Cooke, Main and Reynolds, JJ., concur.

APPENDIX E

UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT, SECTION 1

Section 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED
IN THIS CASE

APPENDIX F

FORMER EDUCATION LAW PROVISIONS PROVIDING SPECIAL EXAMINATIONS FOR "GRANDFATHER" CHIROPRACTORS.

Section 6556. Present practitioners

1. The department shall issue a license to an applicant who files his application, accompanied by a fee of forty dollars, prior to July first, nineteen hundred sixty-five, and who:

a. is twenty-one years of age or over;

b. is a citizen of the United States or who has duly declared his intention of becoming a citizen in accordance with law;

c. is a graduate of a resident course in chiropractic, consisting of not less than two school years of formal study;

d. is of good moral character;

e. is a resident of this state and has been a resident for at least one year prior to July first, nineteen hundred sixty-three;

f. has engaged for the period of at least the fifteen years immediately prior to July first, nineteen hundred sixty-three, in the practice of chiropractic in this state; and

g. passes an examination prepared by the board in the practice of chiropractic and an examination in the use and effect of X-ray.

If the person making application for a license under the provisions of this subdivision does not possess X-ray equipment and does not desire or intend to use X-ray in his practice, the examination in the use and effects of X-ray may be waived by the department upon the submission to it by the person seeking licensure of a suitable affidavit attesting to such lack of possession of X-ray equipment and the desire or intent not to use X-ray. Any certificate of license issued to such a person shall plainly state on the face thereof that the holder is not authorized to use X-ray in his practice, and the holder thereof shall not use X-ray, notwithstanding the provisions of paragraph f of subdivision three of section sixty-five hundred fifty-eight of this chapter. If such a person subsequently certifies that he wishes to use X-rays in his practice he may do so upon passing the examination required by this subdivision.

* * * *

3. The department shall issue a license to an applicant who files his application, accompanied by a fee of forty dollars, prior to July first, nineteen hundred sixty-five, and who at the time meets the requirements set forth in paragraphs a, b, c, d and e of subdivision one of this section and who:

a. has been engaged for the period of at least the two years, and not more than the seven years, immediately prior to July first, nineteen hundred sixty-three, in the practice of chiropractic in this state;

b. passes an examination prepared by the department in the basic subjects of anatomy, physiology, chemistry, hygiene, bacteriology, pathology and diagnosis; and

c. in addition to such written examination, passes a written examination prepared by the board in the use and effects of X-ray and a practical examination prepared by the board in chiropractic.

If the person making application for a license under the provisions of this subdivision does not possess X-ray equipment and does not desire or intend to use

X-ray in his practice, the examination in the use and effects of X-ray may be waived by the department upon the submission to it by the person seeking licensure of a suitable affidavit attesting to such lack of possession of X-ray equipment and the desire or intent not to use X-ray. Any certificate of license issued to such a person shall plainly state on the face thereof that the holder is not authorized to use X-ray in his practice, and the holder thereof shall not use X-ray, notwithstanding the provisions of paragraph f of subdivision three of section sixty-five hundred fifty-eight of this chapter. If such a person subsequently certifies that he wishes to use X-rays in his practice he may do so upon passing the examination required by this subdivision.

NEW YORK EDUCATION LAW SECTION 6551 SUBDIVISION 1 DEFINING CHIROPRACTIC

Section 6551, subdivision 1:

The practice of the profession of chiropractic is defined as detecting and correcting by manual or mechanical means structural imbalance, distortion, or subluxations in the human body for the purpose of removing nerve interference and the effects thereof, where such interference is the result of or related to distortions, misalignment or subluxation of or in the vertebral column.

NEW YORK EDUCATION LAW SECTION 6506
AUTHORIZING THE BOARD OF REGENTS TO
WAIVE SPECIFIC LICENSING REQUIREMENTS
IN ANY PROFESSION OR TO INDORSE LICENSES
OF OTHER JURISDICTIONS

Section 6506. Supervision by the board of regents

The board of regents shall supervise the admission to and the practice of the professions. In supervising, the board of regents may:

* * * *

(5) Waive education, experience and examination requirements for a professional licensee prescribed in the article relating to the profession, provided the board of regents shall be satisfied that the requirements of such article have been substantially met;

(6) Indorse a license issued by a licensing board of another state or country upon the applicant fulfilling the following requirements:

(a) Application: file an application with the department;

(b) Education: meet educational requirements in accordance with the commissioner's regulations;

(c) Experience: have experience satisfactory to the board in accordance with the commissioner's regulations;

(d) Examination: pass an examination satisfactory to the board and in accordance with the commissioner's regulations;

(e) Age: be at least twenty-one years of age;

(f) Citizenship: be a United States citizen, or file a declaration of intention to become a citizen, unless such requirement is waived, in accordance with the commissioner's regulations;

(g) Character: be of good moral character as determined by the department; and

(h) Fees: pay a fee to the department for indorsement of forty dollars.

APPENDIX G

TOMANIO, MARY E. RECORD OF CHIROPRACTIC EXAMINATIONS

A. EXAMINATIONS UNDER FORMER EDUCATION LAW SECTION 6556.

DATE	BACT.	HYG.	CHEM.	DIAG.	PATH.	ANAT.	PHY.	PRACT.	X-RAY
4/64	(28)	(58)	(36)	(61)	(40)	(46)	(57)	(62)	(48)
12/64	(36)	(59)	(48)	(63)	(52)	(49)	(54)	(54)	(49)
66-67	(35)	(56)	(30)	(56)	(57)	(34)	(34)	(60)	(43)
6/67	(43)	(63)	(41)	77	(70)	(59)	(49)	(52)	(43)
12/67	(49)	(63)	(52)		(65)	(56)	(59)	76	(63)
5/71	75		(67)		78	77	75		(64)

B. EXAMINATION UNDER EDUCATION LAW SECTION 6554.

DATE	MICRO.	ANAL.	CHEM.	DIAG.	PATH.	ANAT.	PHY.	PRACT.	X-RAY
1/72	(62)	(52)	(41)	75	75	(71)	75	75	(55)

FEDERAL CIVIL RIGHTS STATUTE

Section 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

APPENDIX

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-424

In the Matter of the Application

of

THE BOARD OF REGENTS of The University of the State of New York and EWALD NYQUIST, as Commissioner of Education and Chief Administrative Officer of the Education Department of the State of New York,

Petitioners,

vs.

MARY TOMANIO,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 14, 1979
CERTIORARI GRANTED NOVEMBER 5, 1979

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DOCKET ENTRIES

Proceedings before New York State Education Department

July 1, 1963	New York Chiropractic Licensing Statute became effective
February 27, 1964	Respondent applied for license under Chiropractic Licensing Statute
April 1964-May 1971	Respondent failed to pass any of special series of six exams for applicants practicing before July 1, 1963
September 15, 1971	Respondent notified of failure to qualify and told to cease practice
September 21, 1971	Respondent applied for waiver of examination requirement and licensure under omnibus provision of Education Law
November 22, 1971	Respondent notified of denial of waiver application
January, 1972	Respondent took and failed regular licensing examination

DOCKET ENTRIES

Proceedings in New York Courts

January, 1972	Respondent commenced proceeding to compel licensure
June 9, 1972	New York Supreme Court, County of Albany-Judgment for respondent directing licensure
July 25, 1972	Notice of Appeal by petitioners to Appellate Division, Third Department
November 15, 1973	Appellate Division unanimously reversed Supreme Court and dismissed respondent's petition for licensure
January 15, 1974	Notice of Appeal, by respondent to New York Court of Appeals
November 21, 1975	New York Court of Appeals unanimously affirmed dismissal of respondent's petition for licensure

DOCKET ENTRIES

Proceedings in United States District Court, Northern District of New York

June 25, 1976	Respondent filed present action
July 23, 1976	Petitioners filed answer
December 12, 1976	Interrogatories filed by respondent
May 26, 1978	Respondent moved for order regarding interrogatories
June 9, 1978	Response to interrogatories and Motion for Summary Judgment filed by petitioners
August 25, 1978	Decision and declaratory judgment in favor of respondent
September 20, 1978	Notice of Appeal by petitioners

DOCKET ENTRIES

Proceedings in United States Circuit Court of Appeals, Second Circuit

December 21, 1978	Action docketed, 78-7637
March 20, 1979	Argument of Appeal
June 19, 1979	Judgment of affirmance, majority and dissenting opinion

DECISION OF THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, THIRD DEPARTMENT

SUPREME COURT-APPELLATE DIVISION
THIRD JUDICIAL DEPARTMENT

In the Matter of MARY TOMANIO, Respondent,
v.
BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, et al., Appellants.

In the Matter of Mary Tomanio, Respondent, v. Board of Regents of the University of the State of New York et al., Appellants. - Appeal from a judgment of the Supreme Court, Albany County, which granted petitioner's application, in a proceeding pursuant to CPLR article 78, seeking to direct the Board of Regents to issue her a license to practice chiropractic in New York State. The petitioner has been practicing chiropractic in this State since 1958. In 1963, by chapter 780 of the Laws of 1963, this State adopted its first chiropractic licensing law and section 6556 of the Education Law became applicable to those who, like the petitioner, were then practicing in the State. In 1971, acting upon the recommendation of the Joint Legislative Committee to revise and simplify the Education Law, the Legislature amended and recodified the then existing law by enacting chapter 987 of the Laws of 1971. Sections 6554 and 6506 of the Education Law are the pertinent sections here. It is important to note that there is no claim here that the amendments in any way diminished or impaired the "grandfather" provisions or any other rights acquired by the petitioner under the original act. Since 1963, the petitioner has continued

her practice and has taken the examination for admittance as required by section 6554 of the Education Law on seven different occasions and has failed to achieve the necessary grade on each opportunity. She does not question the make-up of the examination, nor does she take issue with the grading thereof. Petitioner does contend that her final grade, as computed under 8 NYCRR 73.3, is such that when coupled with her experience, constitutes substantial compliance and that, therefore, the board abused its discretion by not waiving the examination result as she asserts they could and should do under subdivision (5) of section 6506 of the Education Law. As an alternative to receiving a passing grade of 75 in each subject in order to pass the examination, the regulations (8 NYCRR, 73.3) provide in substance that any candidate who passes all required subjects but one, may average the highest grades attained in each subject (passed) with the highest grade obtained in the failed subject and if the average is 75 or more, the candidate shall be deemed to have passed the examination. Using this procedure, petitioner's grade is 74.4. Subdivision (5) of section 6506 of the Education Law provides as follows: "In supervising, the board of regents may: * * * (5) Waive education, experience and examination requirements for a professional license prescribed in this article relating to the profession, provided the board of regents shall be satisfied that the requirements of such

article have been substantially met". It should be remembered that in an article 78 proceeding the court may not substitute its own judgment for that of the board and may inquire only as to whether the record shows facts which leave no possible scope for the reasonable exercise of discretion (Matter of Mid-Is. Hosp. v. Wyman, 25 AD 2d 765, 767). There must be a clear showing that petitioner has established a distinct right to the relief sought (Matter of Stracquadanio v. Department of Health, 285 N.Y. 93). Subdivision (5) of section 6506 of the Education Law is permissive, not mandatory. In its delegation of responsibility in the licensing area, the Legislature sought to provide the Regents with the means of minimizing hardship while at the same time providing overall protection for the public by establishing minimum standards of competence. A review of the applicant's record on the chiropractic examinations and the fact that she failed seven examinations in as many attempts provides ample justification for the Regents' failure to exercise the discretion granted to them and removes any doubt that their action was arbitrary or capricious. Had the board waived the requirements on the record here, it would have abdicated its delegated responsibility, made our licensing provisions meaningless, and indirectly discriminated against the countless numbers who have taken this State's licensing examinations and barely failed. The petitioner has failed to meet her burden and the board's action was thoroughly justified. Judgment reversed, on the law and the facts, and petition

dismissed, without costs. Staley, Jr., J.P., Greenblott, Cooke, Main and Reynolds, JJ., concur.

Decision of Court of Appeals of the State of New York

In the Matter of MARY TOMANIO, Appellant,

v.

BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, et al., Respondents

(Argued October 21, 1975; decided November 20, 1975)

Physicians and surgeons - license to practice chiropractic - petitioner, who had been practicing chiropractic in New York since 1958, had taken licensing examination on seven different occasions subsequent to enactment of chiropractic licensing law; had passed all subjects except chemistry, and had average of 74.4 in group of subjects containing chemistry, while passing mark therein was average of 75, applied to Board of Regents for licensure pursuant to section 6506 (subd [5]) of Education Law, providing that board might waive prescribed education, experience and examination requirements if it was satisfied said requirements had been substantially met - in article 78 proceeding, contention by her that board acted arbitrarily and capriciously when it denied her application - order of Appellate Division which dismissed her petition affirmed - board's refusal to waive examination required by statute was not, as matter of law, abuse of discretion.

Matter of Tomanio v. Board of Regents of Univ. of State of N.Y., 43 AD2d 643, affirmed.

APPEAL from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered November 30, 1973, which (1) reversed, on the law and the facts, a judgment of the Supreme Court at Special Term (De Forest C. Pitt, J.), entered in Albany County in a proceeding pursuant to CPLR article 78, granting a petition for a judgment directing the issuance to petitioner of license to practice chiropractic in New York State, and (2) dismissed the petition. Under the Regulations of the Commissioner of Education, the passing mark for each subject of the chiropractic licensing examination was 75, except that the passing mark in all subjects of any one group of subjects was an average of 75, provided that, in determining the average, no grade less than 65 and only one grade less than 75 was accepted (8 NYCRR 73.3). Under section 6506 (subd [5]) of the Education Law, the Board of Regents might "Waive education, experience and examination requirements for a professional license prescribed in the article relating to the profession, provided [it] shall be satisfied that the requirements of such article have been substantially met". Petitioner had been practicing chiropractic in New York since 1958, had taken the licensing examination on seven different occasions subsequent to the enactment of

the chiropractic licensing law (L 1963, ch 780), had passed all subjects except chemistry, in which she received a mark of 67, and had an average of 74.4 in the group of subjects containing chemistry. She applied to the board for licensure pursuant to section 6506 (subd [5]) of the Education Law, alleging as reasons why it should exercise its statutory power, that she had failed by a narrow margin; that her failure was caused by failing a science not utilized in chiropractic, and that she had qualified for practice in two other States, had passed an examination given by the National Board of Chiropractic Examiners, and had 13 years of practice in New York. In her present proceeding she contended that the board acted arbitrarily and capriciously when it denied her application.

Vincent J. Mutari for appellant.

Donald O. Meserve and Robert D. Stone for respondents.

Order affirmed, without costs. The refusal of the Board of Regents to waive the examination required by statute was not, as a matter of law, an abuse of discretion. (Education Law, §6506, subd [5]; §6554, subd [4]; see, also, Matter of Levi v Regents of Univ. of State of N. Y., 256 App Div 444, affd 281 NY 627.)

Concur: Chief Judge Breitel and Judges Jasen, Gabrielli, Jones, Wachtler and Fuchsberg. Taking no part: Judge Cooke.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

MARY TOMANIO, Plaintiff, -against- THE BOARD OF REGENTS of the University of the State of New York, and EWALD NYQUIST, as Commissioner of Education and Chief Administrative Officer of the Education Department of the State of New York, Defendants.	COMPLAINT CIVIL ACTION NO. 76-CV-263

Plaintiff, by her attorney, respectfully alleges:

I. JURISDICTION

1. This is a civil action brought by the plaintiff for a preliminary injunction to stay defendants from preventing plaintiff's practice of chiropractic in the State of New York, pending a final determination of the matter herein, and for a judgment declaring defendants use of their discretionary power to waive requirements for chiropractic licenses in New York State,

violative of the due process clauses of the 14th and 5th amendments of the United States Constitution, and ordering defendants to grant a license to plaintiff for such chiropractic practice.

2. Jurisdiction is conferred upon this Court by Title 28 of the United States Code, Sections 1331, 1343, 2201 and 2202 and by Title 42, Section 1983.

3. The amount in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand ($10,000.00) dollars.

II. PLAINTIFF

4. The plaintiff in this action is a 56 year old woman who has been legally practicing chiropractic in New York State for the past 18 years, and who has qualified in every respect for licensure as a chiropractor except that she failed one part of a licensing examination by .6 of 1%. Plaintiff is a citizen of the United States.

III. DEFENDANTS

5. The defendant, BOARD OF REGENTS, is a body of persons appointed by the Governor of the State with the approval of the State Senate, among whose duties is the supervision of the admission to the practice of the profession of chiropractic in New York State.

6. The defendant, EWALD NYQUIST, is the Commissioner of Education and Chief Administrative Officer of the Education Department of New York State, among whose duties is the administration of the Education Law of the state and regulations promulgated thereto.

IV. FACTUAL ALLEGATIONS

7. The plaintiff is over 56 years old and has been practicing chiropractic for more than 18 years in New York State.

8. Prior to 1963 no license was required in New York State to practice chiropractic.

9. In 1963 a licensure statute was passed and since that time, the practice of chiropractic without a license in New York State has been a crime. However, pursuant to state law and a court ordered "stay" in a legal action concerning the licensure examination, plaintiff and other chiropractors in practice before the statute was passed, were permitted to remain in practice while taking licensing examinations.

10. On the said chiropractic licensure examinations, plaintiff passed anatomy, physiology, bacteriology, pathology, hygiene, diagnosis and the practice of chiropractic, failing only chemistry, a science chiropractors are actually forbidden by law to utilize in New York State.

11. The New York State Education Commissioner's regulations, Section 73.3 of Title 8 of the Official Compilation of Codes, Rules and Regulations of the State of New York, direct that, if there is a failure in only one science subject, all grades in the science group (anatomy, physiology, chemistry, bacteriology, and pathology) shall be averaged, and, if the averagegrade thus determined is 75 or more, the applicant shall be deemed to have passed all subjects in that group. In the case of the plaintiff, the applicants' average grade for the science group was 74.4. Her grades in all other groups were, of course, passing.

12. New York State Education Law Section 6506, Subdivision 5, effective September 1, 1971, states "the board of regents shall supervise the admission to and the practice of the professions. In supervising, the board of regents may:..... (5) waive education, experience and examination requirements for a professional license prescribed in the article relating to the professions, provided the board of regents shall be satisfied that the requirements of such article have been substantially met."

13. Plaintiff therefor applied to defendant Board of Regents, setting forth all the facts and reasons which plaintiff felt warranted the exercise of their above power to issue a chiropractic license to her, including the very narrow margin of her examination failure; the fact that she

fulfilled all the other qualifications for licensure as to age, morals and education; and the fact that she had successfully practiced chiropractic for over 13 years with an unblemished record.

14. The defendants denied plaintiff's application, without a hearing or an explanation.

15. On information and belief, the defendants have never granted any application for waiver of professional licensure requirements submitted to them under Education Law 6506, Subdivision 5, since the enactment of the law in 1971 and have admitted in open court that they have not.

16. Plaintiff instituted action for review of the Regents decision denying her application in the Supreme Court, of the State of New York on the grounds that the Regents' decision was arbitrary and capricious use of their power. The State Supreme Court agreed with plaintiff and directed defendants to issue the license in question to her. However, on appeal to the Appellate Division and Court of Appeals, that decision was reversed. In these proceedings, plaintiff never raised the constitutional question.

V. OTHER ALLEGATIONS

17. This suit involves a genuine controversy between plaintiff and

defendants, necessitating declaratory relief, since, if defendants are permitted to continue the use of their discretionary powers in the manner which plaintiff believes is violative of her constitutional right to due process, she will be unable to obtain a license for the practice of her profession in New York State.

18. Since plaintiff does not now have a license to practice chiropractic in New York State, the defendants, at any time that she should attempt to practice the profession by which she has supported her family for 18 years, can prosecute her criminally. The inability to practice her profession is causing her irreparable harm and injury in loss of patients and income, which will not be restored even if, by this action, she receives a license for such practice. On the other hand, no harm can be done by permitting plaintiff to practice the profession in which she has been successfully engaged, without blemish to her record, for over 18 years. Thus, her urgent need for an order of this Court enjoining defendants from interfering with her practice during the pendency of this action, is clear.

19. Plaintiff has no plain, or adequate remedy at law other than this request for declaratory and injunctive relief.

VI. BASIS OF CLAIM

20. The New York State legislature passed the statute giving the Regents the power to waive requirements for licensure with the intent that such power be exercised on occasion, and only after establishment of procedures for fair review of the individual circumstances of each application.

21. Insofar as the Board of Regents has never exercised its power under Section 6506, Subdivision 5 and has never waived any licensure requirement, it is apparent that no such procedures for fair review have been established.

22. In the absence of such fair review procedures, plaintiff was not given and could not have been given, due process as required by the fifth and fourteenth amendments to the Constitution of the United States.

23. In fact, without a historical pattern of such fair review procedures, plaintiff could not even now be given such due process.

24. In the absence of the possibility of such due process, denial of plaintiff's right to resume her practice of chiropractic would be a denial of her constitutional rights. Therefor, the only way in which such rights can be protected is by granting her the waiver she seeks and permitting her to resume her practice, by issuing to her a license for same.

VII. PRAYER FOR RELIEF

25. Plaintiff prays that the following relief be granted:

(1) Defendants be adjudged to have violated plaintiff's constitutional right to due process under the 5th and 14th amendments to the United States Constitution, in denying her application for waiver of a requirement for chiropractic license, and directed to grant her such waiver.

(2) A preliminary injunction issue permitting plaintiff to practice her profession pending trial and final determination of the issues herein.

(3) Plaintiff be granted such other and further relief as this Court may deem proper.

s/ Vincent J. Mutari
Vincent J. Mutari
600 Old Country Rd.
Garden City, NY 11530

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

MARY TOMANIO, Plaintiff, -against- THE BOARD OF REGENTS of the University of the State of New York, and EWALD B. NYQUIST, as Commissioner of Education and Chief Administrative Officer of the State Education Department of the State of New York, Defendants.	ANSWER CIVIL ACTION NO. 76-CV-263

Defendants answering the petition herein, by their attorney, Robert D. Stone, Esq., allege:

FIRST DEFENSE

1. The Court lacks jurisdiction over the subject matter.

SECOND DEFENSE

2. The complaint fails to state a claim upon which relief can be granted.

THIRD DEFENSE

3. The defense of res judicata is applicable. Judgment was entered on a decision of the Court of Appeals of the State of New York, unanimously affirming a unanimous decision of the Appellate Division, Third Department, and dismissing plaintiff's action for the same claim set forth in the complaint in this action (Matter of Tomanio vs. Board of Regents, 43 AD 2d 643, aff'd 38 NY 2d 724).

FOURTH DEFENSE

4. The determination of defendants sought to be reviewed in this action was final and conclusive November 19, 1971, and this action is barred by the Statute of Limitations, Civil Practice Law and Rules section 217.

FIFTH DEFENSE

5. The determination sought to be reviewed in this action was final and conclusive, November 19, 1971 and plaintiff has been guilty of laches in not commencing this action until June 25, 1976.

SIXTH DEFENSE

6. Admit each and every allegation contained in paragraphs numbered 1, 6, 8, 12, 13 and 16 thereof.

7. Deny each and every allegation contained in paragraphs numbered 2, 3, 14, 15, 17, 19, 22, 23 and 24 thereof.

8. Deny knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph numbered 7 thereof.

9. Answering paragraph numbered 4 thereof, defendants deny that plaintiff has been practicing chiropractic legally for the past 18 years, and admit the other allegations therein.

10. Answering paragraph numbered 5 thereof, defendants allege that members of the Board of Regents are elected by the Legislature, and admit the other allegations therein.

11. Answering paragraph numbered 9 thereof, defendants admit each allegation but further allege that the "stay" referred to expired prior to 1971, and that plaintiff was given written notice that she could not legally practice without a license on September 7, 1971.

12. Answering paragraphs numbered 10 and 11 thereof, defendants admit that the chiropractic licensing examination which plaintiff took included an examination in the basic subjects set forth therein, and allege that by combining her best marks on six special examinations given for "grandfather" applicants plaintiff eventually passed all subjects except chemistry, and that by averaging her marks as provided in the Regulations of the Commissioner of Education plaintiff

obtained an average grade in the basic science subjects of 74.4, but that 75.0 was passing, and plaintiff failed to meet the examination requirement.

13. Answering paragraph numbered 14 thereof, plaintiff alleges that no hearing was required on plaintiff's request for licensure notwithstanding her failure to pass the examination and deny that no explanation was given to plaintiff.

14. Answering paragraphs numbered 15, 20 and 21 thereof, plaintiff admits that the provisions of present section 6506 subdivision 5 of the Education Law continued the authority of the Board of Regents, formerly contained in Education Law section 211, to waive specific licensing requirements in appropriate eases, but deny that such authority was intended to or does require them to waive a failure on a professional licensing examination, and alleges that it has not been used for that purpose, and deny the other allegations therein.

15. Answering paragraph numbered 18 thereof, defendants allege that to permit the plaintiff to practice chiropractic without a licensing (sic) notwithstanding her failure to pass the licensing examination would be contrary to the public interest and would do substantial harm and admit the other allegations contained therein.

16. Plaintiff has no constitutional right to practice chiropractic without a license or to a waiver of her failing marks on the licensing examinations.

17. The Court of Appeals and Appellate Division of the State of New York have judicially construed the provisions of section 6506 subdivision 5 of the Education Law and have rejected plaintiff's claim that such provisions entitled her to a waiver of her failure to pass the examination. Such construction should be followed by this Court.

WHEREFORE, defendants demand:

(1) That the complaint be dismissed;

(2) Such other and further relief as to the Court may seem just and proper.

s/Donald O. Meserve
Donald O. Meserve, Esq.,
of Counsel
Attorney for Defendants
State Education
Department
Albany, New York 12234
(518) 474-8869

Dated: July 16, 1976

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

MARY TOMANIO, Plaintiff, -against- THE BOARD OF REGENTS of the University of the State of New York, and EWALD NYQUIST, etc., Defendants.	INTERROGATORIES CIVIL ACTION NO. 76-CV-263

TO: ROBERT D. STONE, ESQ.
Attorney for Defendants
N.Y. State Education Dept.
Education Building
Albany, New York 12224

The plaintiff requests that the defendants, by the secretary of the BOARD OF REGENTS, or by any other agent or servent of the defendants familiar with its decisions under former Section 211, Subdivision 3 of the New York State Education Law, and current Section 6506, Subdivision 5 of the same law which replaced it, including the decision of the defendant in the matter herein, answer under oath in accordance with Rule 33 of the Federal Rules of Civil Procedure, the following interrogatories:

1. What is your name?

2. For whom do you work?

3. What is your position?

4. How long have you held that position?

5. How long have you worked for the defendant?

6. In what position, if other than your present?

7. On November 19, 1971, what was your position with the defendant?

8. Were you present at the November 19, 1971 meeting of the BOARD OF REGENTS of the University of the State of New York?

9. Are you familiar with the proceedings that took place at that meeting?

10. Are you familiar with the proceedings and correspondence pertaining to the plaintiff's application for licensure, preceeding the November 19, 1971 meeting of the BOARD?

11. Do you further hold yourself out to be a person who has knowledge of all the facts and circumstances surrounding and underlying the decision of the BOARD OF REGENTS?

12. To your best present knowledge if there is a hearing or trial of this matter will you be a witness on behalf of the defendant?

13. Are you fully familiar with the procedures of the BOARD OF REGENTS of the University of the State of New York?

14. Are you familiar with the New York State Education Commissioner's regulations, particularly Section 73.3 of Title 8 of the Official Compilation of Codes, Rules and Regulations of the State of New York?

15. Are you familiar with N.Y. State Education Law, Section 6506, Subdivision 5, effective September 1971?

16. At the meeting held on November 19, 1971 was the plaintiff present?

17. Was her attorney present?

18. Was any documentation or writing pertaining to the application of the plaintiff, other than her attorney's letters of October 1, 1971 and September 21, 1971 presented?

19. If your answer is yes, what other written documentation was there at that meeting pertaining to plaintiff's

application, and please furnish plaintiff with copy of such documentation upon the return of these interrogatories.

20. Was a hearing held and witnesses questioned on November 19, 1971 with regard to plaintiff's application for licensure?

21. From your best knowledge of the records and procedures has the BOARD OF REGENTS of the University of the State of New York ever granted a license after an application for licensure in the chiropractic profession made under Section 211, Subdivision 3 of the State Education Law or current Section 6506, Subdivision 5 of the same law?

22. From your best knowledge of the records of the BOARD OF REGENTS of the University of the State of New York, has the Board ever granted a license after an application for licensure in any profession made in accordance with Section 211, Subdivision 3 of the State Education Law, or the current Section 6506, Subdivision 5 of the same Law?

23. Have the refusals of licensure been made other than in this case after a formal hearing to other chiropractic or other professionals?

24. Have the grantings, if any, of licensure under the herein involved statutes been made after a formal hearing?

25. Demand is made of the defendant for a certified copy of the November 19, 1971 meeting of the BOARD OF REGENTS of the University of the State of New York.

PLEASE TAKE NOTICE that a copy of such answers must be served upon the undersigned within fifteen (15) days after the service of these interrogatories.

s/ Vincent J. Mutari

Dated: December 20, 1977

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

MARY TOMANIO,

Plaintiff,

-against-

THE BOARD OF REGENTS of the University of the State of New York, and EWALD B. NYQUIST, as Commissioner of Education and Chief Administrative Officer of the State Education Department of the State of New York,

Defendants.

RESPONSE TO INTERROGATORIES

CIVIL ACTION NO. 76-CV-263

STATE OF NEW YORK:
: SS.:
COUNTY OF ALBANY :

PHILIP R. JOHNSTON, being duly sworn deposes and says that the following are his answers to the questions in the interrogatories on behalf of the plaintiff Mary Tomanio dated December 20, 1977:

1. Philip R. Johnston.

2. New York State Education Department.

3. Executive Secretary-State Board for Chiropractic and Executive Secretary-State Board for Social Work.

4. In the first position since October, 1968; in the latter position, December, 1965.

5. Twelve years, five months.

6. As described above.

7. Executive Secretary of the State Board for Chiropractic and Executive Secretary of the State Board for Social Work.

8. No.

9. I am familiar with the results of the proceedings of the November 19, 1971 meeting of the Board of Regents but I do not know what discussion occurred.

10. Yes.

11. Not being in the present at the meeting, I cannot be fully knowledgeable regarding the decision of the Board of Regents.

12. This would depend on whether or not I was requested to appear.

13. I am generally familiar with the procedures of the Board of Regents.

14. Yes.

15. Yes.

16. Not to my knowledge.

17. Not to my knowledge.

18. Yes, a summary prepared by staff of the Department was submitted to the Regents.

19. See attached.

20. No.

21. No (to the best of my knowledge only one other person has ever petitioned under these provisions for a license. The other petitioners have always been asking for waiver of preprofessional requirements so that they could be admitted to the examination).

22. Yes.

23. No. The authority to waive specific requirements for a professional license is not exercised in favor of candidates who are unable to pass the licensing examination in this State and who have demonstrated that ability by repeated failures on that examination. No formal hearing is held or required in the administration of this policy.

24. Not to my knowledge.

25. I have carefully reviewed the minutes of the Board of Regents on November 19, 1971. The only reference to the Regents action on petitioner's application contained therein is the statement on page 866 of the Regents Journal "voted, admission to the licensing examination in chiropractic after reapplication, as follows: Mary Tomanio, Beacon." I am also attaching herewith a copy of my report to the Committee on the Professions dated October 14, 1971 and of an October 15, 1971 letter from Vincent J. Mutari also submitted to that Committee. The entire licensing file was submitted to the Committee on the Professions. The Committee on the Professions, a staff committee within the Department submitted its recommendation on petitioner's application to the Board of Regents and a copy of that recommendation is also attached. The Board of Regents accepted the recommendation of the staff committee.

s/Philip R. Johnston

Sworn to before me
this 9th day of June, 1978.

s/Frederick W. Burgess
Notary Public

THE UNIVERSITY OF THE STATE OF NEW YORK
THE STATE EDUCATION DEPARTMENT

DATE: October 14, 1971

TO: Committee on the Professions

FROM: Philip R. Johnston

SUBJECT: Petition of Mary Tomanio, D.C. for a License to Practice Chiropractic

Required: The applicant applied for examination under Section 6556-3 which required, a. has been engaged for a period of at least two years, and not more than the seven years immediately prior to July 1, 1963, in the practice of chiropractic in this state; b. passes an examination prepared by the Department in the basic subjects of anatomy, physiology, chemistry, hygiene, bacteriology, pathology and diagnosis; and c. in addition to such written examination passes a written examination prepared by the board in the use and effects of x-ray and a practical examination prepared by the board in chiropractic.

Obtained: The candidate sat for examinations in April, 1964, December, 1964, January, 1967, June, 1967, December, 1967, and May, 1971. These included the five regular opportunities provided by law under Section 6556, plus the

special make-up examination provided by stipulation. The highest grades obtained in each subject are as follows: Chemistry-67; Anatomy-77; Physiology-75; Bacteriology-75; Pathology-78; Diagnosis-77; Practice-76.

Pursuant to Section 73.3 of the Commissioner's Regulations the subjects of Anatomy, Physiology, Chemistry, Bacteriology, and Pathology were averaged, resulting in a grade for the five subjects of 74.4. The subject of x-ray had not been passed but is not fundamental in this classification to a limited license.

Problem: The petitioner seeks waiver of the requirement of passing the Chemistry examination pursuant to the Regents authority contained in Section 6506, Subdivision 5 and 9, with emphasis on the fact that "the requirements have been substantially met." A further argument is used that the chiropractic law forbids the use of chemistry in chiropractic practice.

Recommendation of Board Secretary: A memorandum of October 8, 1971 from Donald O. Meserve is brought to attention for the purpose of emphasizing, "I can say as a matter of law that it would be arbitrary, capricious and an abusive discretion for us to go along with it (the request)." Considerable leeway has already been provided through the regulation on averaging. The basic science subjects are considered fundamental to the understanding necessary for modern practice of chiropractic, and, therefore, the statement that use of chemistry is prohibited is erroneous. It is recommended that the candidate be required to reapply and take additional examination until she has met the stated requirements of the law.

RECOMMENDATION OF COMMITTEE SECRETARY:

Deny petition: license after successful completion of full chiropractic examination series.

TO BE COMPLETED FOR EXAMINATION:

Reapplication

Law Office

VINCENT J. MUTARI
Franklin National Bank Bldg.
600 Old Country Road-Suite 328
Garden City, New York 11530

Telephone: (516) 746-4240-1

October 15, 1971

The Board of Regents
Albany, N.Y. 12201

Att: Richard J. Sawyer, Secy.

Re: Mary Tomanio, D.C.

Dear Sirs:

I am pleased to learn from Mr. Johnston's letter of October 7, 1971, that, in response to my letters to you of September 21st and October 1st, Dr. Tomanio's application for chiropractic licensure, pursuant to Section 6506 of the Education Law, will be reviewed at your October 26th meeting.

For your further consideration in this matter, may I state that Dr. Tomanio's case can be importantly distinguished from the line of earlier situations in which medical doctors, having practiced in other states for 5 years or more, come into this state asking to be admitted without taking the required licensure examinations. Dr. Tomanio, it is true, does base her plea in part on the fact that she has been admitted in two other states, but she does not rely upon this alone. She shows further that she has taken and passed examinations which we

understand to be substantially similar to the New York examinations; namely, the examinations in New Hampshire and those given by the National Board of Chiropractic Examiners. It is our understanding in fact that the recent New York examinations were modeled to a substantial degree after those of the National Board.

In addition Dr. Tomanio submits that she has been practicing in this state for 13 years and has not attempted to avoid taking the New York examinations. In fact she has taken the full series provided for her by the "grandfather" provisions of the chiropractic licensing statute and has substantially met the requirements of that examination, having passed all subjects except chemistry which by law is never used in chiropractic practice, and having achieved an over-all average of 74.4 which is a bare 6/10ths of a percentage point below the passing grade.

All these facts taken together make Dr. Tomanio's situation unique as compared with the case law mentioned above which refers only to medical doctors practicing 5 years in another state. We sincerely feel that she fulfills the requirements of former section 211, and even more fully

conforms to the new requirements of Section 6506. We therefore earnestly urge you to exercise the discretion afforded you by that section to issue to her the license she desperately needs to continue in the practice by which she has supported her family for 13 years.

Very truly yours,

Vincent J. Mutari

vjm:ns
cc: Dr. E. E. Leuallen
P. E. Johnston

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

MARY TOMANIO,

Plaintiff,

-against-

76-CV-263

THE BOARD OF REGENTS of the University of the State of New York; and EWALD NYQUIST, as Commissioner of Education and Chief Administrative Officer of the Education Department of the State of New York,

Defendants.

APPEARANCES: OF COUNSEL:

VINCENT J. MUTARI
Attorney for Plaintiff
600 Old Country Road
Garden City, New York 11530

ROBERT D. STONE DONALD O. MESERVE
Attorney for Defendants
State Education Department
Education Building
Albany, New York 12224

JAMES T. FOLEY, D. J.

MEMORANDUM-DECISION and ORDER

Plaintiff Mary Tomanio commenced this action premised on the Fourteenth Amendment and 42 U.S.C. § 1983 on June 25, 1976, invoking the jurisdiction of this Court pursuant to 28 U.S.C. §§ 1331 and 1343. The ultimate relief that plaintiff seeks is an order directing the defendants Board of Regents of

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4899 CHIROPRACTIC
Mary Tomanio, Beacon, New York
(The Palmer College of Chiropractic, Davenport, Iowa, Doctor of Chiropractic 1957)

Petition for: License to practice chiropractic.

Recommendation: Admit to licensing examination in chiropractic after reapplication.

Since petitioner has not passed chiropractic examinations in accordance with law and Regulations, it is recommended that petition for licensure on the basis of obtained examination scores be denied and that licensure as chiropractor be approved upon successful completion of the full chiropractic examination series as required. In accordance with statute, to be admitted to the chiropractic examination series, petitioner shall make formal reapplication.

TO BE COMPLETED FOR LICENSURE AS CHIROPRACTOR
Submission of application for admission to examination and successful completion of full licensing examination.

the State of New York and Ewald B. Nyquist, then Commissioner of Education and Chief Administrative Officer of the Education Department of the State of New York, to waive examination requirements and issue her a license to practice chiropractic in the State of New York.

Presently before the Court is plaintiff's motion for a preliminary injunction permitting plaintiff to practice her chosen profession in the State of New York and enjoining the County Court of Dutchess County, New York, from proceeding with a pending criminal prosecution for the practice of chiropractic without a license until such time that this Court rules on the merits of plaintiff's complaint. Also before the Court is defendants' motion for summary judgment in their favor on the grounds of, inter alia, res judicata, failure to state a claim upon which relief can be granted, and statute of limitations.

FACTUAL BACKGROUND

Plaintiff has been practicing chiropractic in this state since 1958. In 1963, at the behest of chiropractors, New York State enacted a licensing scheme for the practice of chiropractic. See N.Y. Times, April 30, 1963, at 37, col. 1.

On seven separate occasions between 1964 and 1971 plaintiff attempted to satisfy the chiropractic licensing examination requirement pursuant to a "grandfather" provision applicable to those, like plaintiff, who were then practicing in New York State.

See Ch. 780, §1 [1963] N.Y. Laws 1282-1285 (McKinney) (former N.Y. Education Law § 6556). Although plaintiff failed to achieve the necessary grades for licensing, her failure was by a very narrow margin. See Tomanio v. Board of Regents, 43 App. Div. 2d 643 (3d Dep't 1973)(mem.), aff'd mem., 38 N.Y. 2d 724 (1975). Plaintiff failed one part of the licensing examination, chemistry by 8 points. Through use of the Education Department's regulation on averaging, 8 N.Y. C.R.R. § 73.3, plaintiff's failure in the science part of the examination, which includes chemistry, was by only .6 of 1%. Plaintiff received passing scores in all other subjects. In 1972, subsequent to her inability to pass the examinations given under the "grandfather" provision of the new statute, plaintiff took the regular licensing examination for chiropractors and again failed to attain a passing score. See N.Y. Education Law § 6554(4) (McKinney 1972).

Plaintiff is now over 58 years old and is the sole supporter of her family. She is licensed to practice chiropractic in Maine and New Hampshire and has passed an examination given by the National Board of Chiropractors. On September 21, 1971, plaintiff applied to defendant Board of Regents for waiver of the examination requirement pursuant to New York Education Law § 6506(5) (McKinney 1972). Under § 6506(5) the Board of Regents, in their discretion, can waive education, experience, and examination requirements if it is satisfied that the requirements for a professional license have been "substantially met." After such a waiver, the New York State Education Department would be authorized to issue a license.

By letter dated November 22, 1971, plaintiff was informed that the Board of Regents had voted on November 19, 1971, to deny her application for waiver of the examination requirement. Thereafter, by petition verified on December 10, 1971, and order to show cause signed January 26, 1972, plaintiff commenced an Article 78 proceeding attacking the decision of the Board of Regents as arbitrary and capricious and seeking an order directing the New York State Education Department and the Board of Regents to issue her a license to practice chiropractic in the State of New York.

Plaintiff's petition was granted at Special Term of the Supreme Court of the State of New York, but that order was reversed by the Appellate Division, Third Department. On November 20, 1975, the New York State Court of Appeals affirmed the order of the Appellate Division holding that as a matter of law the Board of Regents had not abused their discretion in denying plaintiff's application. Tomanio v. Board of Regents, 38 N.Y.2d 724 (1975), aff'g mem. 43 App. Div. 2d 643 (3d Dep't 1973)(mem.). See Generally Marburg v. Cole, 286 N.Y. 202 (1941).

Then, on June 25, 1976, plaintiff commenced the present action in this Court premised on violation of the due process clause of the Fourteenth Amendment. Thereafter, and now pending in the County Court of Dutchess County, a criminal action was initiated against plaintiff charging her with the unauthorized practice of chiropractic. See N.Y. Education Law § 6512 (McKinney Supp. 1977).

DISCUSSION

A

As previously noted, defendants move for summary judgment and dismissal of plaintiff's complaint on the ground of res judicata. This portion of defendants' motion is based on the prior Article 78 proceeding brought by plaintiff in the state courts. The Court of Appeals Second Circuit, however, has held that a prior state court proceeding will not bar a federal court in a civil rights action from considering matters that were not actually litigated and determined in the prior proceeding. See, e.g., Ornstein v. Regan, 574 F.2d 115 (2d Cir. 1978); Graves v. Olgiati, 550 F.2d 1327 (2d Cir. 1977); Lombard v. Board of Education, 502 F.2d 631 (2d Cir. 1974), cert. denied, 420 U.S. 976 (1975).

The record on appeal and briefs submitted to the New York State Court of Appeals clearly establish that plaintiff did not raise a due process claim before the courts of the State of New York. Therefore, principles of res judicata do not bar plaintiff's present action under the Civil Rights Act alleging deprivation of her constitutional right to due process of law. This same reasoning should apply to plaintiff's assertion of a claim brought directly under the Fourteenth Amendment with jurisdiction predicated on 28 U.S.C. § 1331.

B

Defendants also challenge plaintiff's complaint on the ground that it fails to state a claim upon which relief can be granted. Defendants contend that no hearing is required before the Board of Regents when it is asked to waive a specific licensing requirement by an individual who, prior to the advent of licensing in the State of New York, had

previously been permitted to practice chiropractic in this state.

Due process is a flexible concept, the contours of which are shaped by the circumstances of each particular situation. Mathews v. Eldridge, 424 U.S. 319, 334 (1976). Turning to the particular situation that is before this Court, it is evident that plaintiff has a constitutional right to practice her profession free from unreasonable governmental interference. Green v. McElroy, 360 U.S. 474, 492 (1959). While this is true, however, the imposition of a new requirement for the continued practice of that calling, in and of itself, does not offend the Constitution. Gray v. Connecticut, 159 U.S. 74 (1895); Wasmuth v. Allen, 14 N.Y. 2d 391, appeal dismissed, 379 U.S. 11 (1964)(per curiam). See also Bell v. Burson, 402 U.S. 535, 539 (1971).

In my judgment, the practice of chiropractic in this state, prior to the licensing scheme enacted in 1963, is a "property" interest and "liberty" interest that cannot be taken away by the state except in accordance with principles of due process as embodied in the Fourteenth Amendment. See, e.g. Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972); Meyer v. Nebraska, 262 U.S. 390 (1923); Huntley v. Community School Board, 543 F.2d 979, 986 n.8 (2d Cir. 1976), cert. denied, 430 U.S. 929 (1977); Hecht v. Monaghan, 307 N.Y. 461 (1954). Furthermore, in determining whether to waive the examination requirements in plaintiff's behalf, the Board of Regents was called upon to ascertain "the existence of certain past or present facts upon which a decision is to be made and rights and liabilities determined." Hecht v. Monaghan, supra, 307 N.Y. at 469.

Under these circumstances, it is my opinion that before the Board of Regents decided to deny plaintiff's application for waiver of the examination requirement and licensure, a determination that is predominantly adjudicative, a hearing should have been held. See generally Weinberger v. Hynson, Westcott & Dunning, Inc. 412 U.S. 609, 637 (1973)(Powell, J., concurring). In my judgment, it is not significant under the facts of this case that pursuant to New York's statutory scheme the Board of Regents is given the authority to deny or grant a waiver of statutory licensing requirements rather than authority to withdraw or sustain the grant of a state license. The last action taken by the state with regard to plaintiff's ability to practice chiropractic in New York was contained in a letter from the Board of Regents dated November 22, 1971. By that letter, which denied plaintiff's application for waiver of examination requirements and licensure to practice chiropractic the Board of Regents terminated a "property" interest and "liberty" interest protected by the Fourteenth Amendment -- plaintiff's right to continue to practice her chosen profession.

It is not this Court's role to substitute its judgment for that of the Board of Regents in this matter. Yet, as the New York State Court of Appeals has stated, "it is no answer to say that in [t]his particular case due process of law would have led to the same result." Hecht v. Monaghan, supra, 307 N.Y. at 470. Although it does not appear that plaintiff requested a hearing or that a hearing is contemplated by statute, some form of hearing should have been held under

the circumstances of this case. Id. at 468. This decision, however, should not be misunderstood to require some form of hearing in every situation where an individual seeks a waiver of licensing requirements. For instance, a person who was not practicing chiropractic in New York prior to 1963 presents a totally different situation than that which is before this Court. In addition, it should be noted that there is no indication in the record that the burden to be borne by the state in providing some form of hearing to applicants such as the plaintiff would be of insurmountable magnitude. See Mathews v. Eldridge, supra, 424 U.S. at 335.

Furthermore, I believe that if, after a hearing as discussed above, a person is denied the right to continue in the practice of his or her chosen calling, then that person is entitled to a formal written statement of reasons articulated by the Board of Regents setting forth the basis for that determination. See Hornsby v. Allen, 326 F.2d 605, on rehearing, 330 F.2d 55 (per curiam) (5th Cir. 1964); Davis v. Clyne, 56 App. Div. 2d 692 (3d Dep't 1977)(mem.). See also Davis v. Clyne, 58 App. Div. 2d 947 (3d Dep't 1977) (mem.), leave to appeal denied, 44 N.Y.2d 646 (1978).

Therefore, in my judgment, this portion of defendants' motion is without merit and must be denied. See Schware v. Board of Bar Examiners, 353 U.S. 232, 238-39 (1957); Barnes v. Merritt, 376 F.2d 8 (5th Cir. 1967); Birnbaum v. Trussell, 371 F.2d 672 (2d Cir. 1966).

C

Defendants' motion for summary judgment also sets forth the ground of statute of limitations. A statute of limitations reflects legislative wisdom in selecting a period within which to commence an action that balances the interests of preserving meritorious claims, discouraging frivolous claims, and preventing the prejudice and surprise attendant to the revival of stale claims. Federal law does not provide a specific statute of limitations for actions brought pursuant to 42 U.S.C. § 1983 or directly under the Fourteenth Amendment. Under such circumstances the applicable period of limitations will usually be taken from the most analogous statute of limitations provided for by state law. E.g., Johnson v. Railway Express Agency, Inc. 421 U.S. 454 (1975); Swan v. Board of Higher Education, 319 F.2d 56 (2d Cir. 1963).

It has long been held that New York's three-year time period for actions "to recover upon a liability, penalty or forfeiture created or imposed by statute," N.Y. C.P.L.R. § 214(2) (McKinney Supp. 1977), governs civil rights actions brought pursuant to 42 U.S.C. § 1983 and its jurisdictional counterpart 28 U.S.C. § 1343. E.G., Meyer v. Frank, 550 F.2d 726 (2d Cir.), cert. denied, 434 U.S. 830 (1977); Kaiser v. Cahn, 510 F.2d 282 (2d Cir. 1974); Romer v. Leary, 425 F.2d 186 (2d Cir. 1970).

Assuming arguendo that plaintiff has stated a claim directly under the Fourteenth Amendment with jurisdiction grounded in 28 U.S.C. § 1331, see Turpin v. Mailet, Slip Op. 3243 (2d Cir. June 5, 1978) (en banc), I would apply the same statute of limitations that governs

plaintiff's claim brought under the Civil Rights Act. See id. at 3271; Cestaro v. Mackell, 429 F. Supp. 465 (E.D.N.Y. 1977).

Furthermore, the Court of Appeals, Second Circuit, has applied the same statute of limitations to equitable as well as legal remedies sought under the Civil Rights Act. Williams v. Walsh, 558 F.2d 667 (2d Cir. 1977). But see Ornstein v. Regan, supra, 574 F.2d at 119.

In my judgment, New York's three-year statute of limitations found in N.Y. C.P.L.R. § 214(2) governs plaintiff's claim asserted in this lawsuit. As is evident from the pleadings, plaintiff's claim arose in November 1971 when her application for waiver of the examination requirement and licensure was denied by the Board of Regents. See Ornstein v. Regan, supra, 574 F.2d at 119. Although it may appear that plaintiff's claim is time-barred, this does not end a court's inquiry into the timeliness of a claim.

Notwithstanding the passage of time since the conduct that plaintiff complains of, her action may still be timely and her claim saved if circumstances exist that would have tolled the running of the statute of limitations. In Mizell v. North Broward Hospital District, 427 F.2d 468 (5th Cir. 1970), the Court of Appeals, Fifth Circuit, posited that the statute of limitations applicable to a civil rights action is tolled during the pendency of administrative and judicial proceedings aimed at vindicating a plaintiff's state-created rights. As of yet, however, the Court of Appeals, Second Circuit, has failed to address itself to this issue.

E.g., Williams v. Walsh, supra, 558 F.2d at 673 n.5; Meyer v. Frank, supra, 550 F.2d at 729 n.8. But see Ornstein v. Regan, supra, 574 F.2d at 119.

In my judgment, the present overburdening of the federal courts and the increased filings of civil rights complaints are factors that mitigate in favor of encouraging the utilization of effective and feasible administrative and judicial remedies, which exist under state law, in certain situation. See, e.g., Moore v. City of East Cleveland, 431 U.S. 494, 521 (1977) (Burger, C.J., dissenting); Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969), cert. denied, 400 U.S. 841 (1970).

Although a toll of the statute of limitations in civil rights actions should not be routinely recognized, see, e.g., Johnson v. Railway Express Agency, Inc., supra, 421 U.S. at 454; Prophet v. Armco Steel, Inc., 575 F.2d 579 (5th Cir. 1978)(per curiam); Meyer v. Frank, supra, 550 F.2d at 726, I believe that under the facts of this case a toll is justified and would be in accordance with federal policy considerations under the Civil Rights Act.

Plaintiff's Article 78 proceeding was brought in state court almost immediately after the decision by the Board of Regents to deny her application. That proceeding was premised entirely on state-created rights and in pursuit of state-created remedies. It was not until November 20, 1975, that plaintiff's petition was dismissed by the New York State Court of Appeals. Thereafter, on June 25, 1976, plaintiff commenced the present action for vindication of her federally secured rights.

In my judgment, it cannot be said that plaintiff has slept on her rights. See Johnson v. Railway Express Agency, Inc., supra, 421 U.S. at 466.

Therefore, this Court holds, under the reasoning expounded in Mizell v. North Broward Hospital District, supra, that plaintiff's claim of deprivation of federally protected rights is not time-barred; the period of limitation having been tolled during the pendency of plaintiff's Article 78 proceeding in the state courts. Thus, this portion of defendants' motion for summary judgment must be denied.

D

Having canvassed all of the pleadings in this lawsuit, it is my opinion that defendants have not raised a viable defense to this action. See Answer, filed July 23, 1976; Roth v. Board of Regents, 310 F. Supp. 972, 974-75 (W.D. Wis. 1970), aff'd, 446 F. 2d 806 (7th Cir. 1971), rev'd on other grounds, 408 U.S. 564 (1972). Furthermore, inasmuch as there is no genuine dispute as to any material fact between the parties and because a motion for summary judgment searches the record, it is clear to my mind that plaintiff is entitled to judgment on her claim brought pursuant to the Civil Rights Act as a matter of law for the reasons set forth in Part B above. See 6 J. Moore, Federal Practice ¶ 56.12 (2d ed. 1977); 10 C. Wright & A. Miller, Federal Practice and Procedure § 2720 (1973).

Therefore, due to the fact that the Court has reached a final determination of plaintiff's claim on the merits, plaintiff's motion for a preliminary injunction is now moot. The only issue remaining is that of appropriate relief.

By her complaint, plaintiff seeks declaratory and injunctive relief as well as such other relief as this Court may deem proper. More specifically, plaintiff seeks a declaration, under the Federal Declaratory Judgments Act, U.S.C. §§ 2201-2202, that plaintiff's constitutional right to due process was violated by the Board of Regents' denial of her application for waiver of the examination requirement; an order directing the Board of Regents to grant her application for waiver of the examination requirement; and a preliminary injunction permitting plaintiff to practice her chosen profession pending trial and final judgment on the merits of her claim.

Plaintiff's request for a preliminary injunction is now moot. In addition, I believe it would be improper for me in fashioning relief to order the Board of Regents to grant plaintiff's application for a waiver of the examination requirement or to order the New York State Education Department to issue her a chiropractic license. See Wicker v. Hoppock, 73 U.S. (6 Wall.) 94, 99 (1867). Such relief could not be justified and would not be a proper remedy for vindication of the constitutional rights violated under the circumstances presented herein. See, e.g. Hornsby v. Allen, supra, 330 F.2d at 56.

Therefore, under the circumstances presented, the only relief that plaintiff seeks and to which she is entitled is a declaration that her constitutional right to due process of law under the Fourteenth Amendment was violated by the absence of some form of hearing prior to the Board of Regents' denial of her application for waiver of the examination requirement.

CONCLUSION

Accordingly, it is hereby declared and adjudged that under the due process clause of the Fourteenth Amendment plaintiff's federally secured rights were violated by defendant Board of Regents' decision not to waive the chiropractic examination requirement in plaintiff's behalf, which determination was made without affording the plaintiff some form of hearing and which was made without a formal written statement of reasons indicating why she was not granted such a waiver. All other relief requested by the plaintiff is hereby denied.

Consequently, defendants' motion for summary judgment is denied in its entirety and plaintiff's motion for a preliminary injunction is denied and dismissed as moot in light of the rulings of the Court herein.

The Clerk is hereby directed to enter a final and declarative judgment in favor of plaintiff Mary Tomanio on her claim brought under the Civil Rights Act in accordance with this memorandum-decision.

It is so Ordered.

Dated: August 25, 1978
Albany, New York

s/James T. Foley
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 798—August Term, 1978.

(Argued March 20, 1979 Decided June 19, 1979.)

Docket No. 78-7637

MARY TOMANIO,

Plaintiff-Appellee,

—against—

THE BOARD OF REGENTS of the University of the State of New York; and EWALD NYQUIST, as Commissioner of Education and Chief Administrative Officer of the Education Department of the State of New York,

Defendants-Appellants.

Before:

OAKES and LUMBARD, *Circuit Judges,* and
BRIEANT, *District Judge.**

Appeal from summary judgment granted by Chief Judge Foley of the United States District Court for the Northern District of New York declaring that appellee's

* Honorable Charles L. Brieant, United States District Court for the Southern District of New York, sitting by designation.

civil rights were violated by failure to grant a hearing prior to denying a waiver, under New York Education Law § 6506(5), of examination requirements for a license to continue the practice of chiropractic.

Affirmed.

DONALD O. MESERVE, Esq., Albany, New York (Jean M. Coon, Assistant Attorney General, State of New York, of counsel) *for Defendants-Appellants.*

VINCENT J. MUTARI, Esq., Garden City, New York, *for Plaintiff-Appellee.*

BRIEANT, *District Judge:*

Appellants (hereinafter "the Board of Regents" or "the Regents") seek to review a final judgment of the United States District Court for the Northern District of New York, James T. Foley, Chief Judge, which declared the Regents had violated plaintiff-appellee's civil rights. The Regents urge that the district court erred in holding that under the circumstances detailed below, appellee was entitled to an impartial hearing and statement of reasons for denial of her application for a waiver of state professional licensing requirements, as authorized by New York Education Law, § 6506(5). The Regents also claim the action should have been dismissed as *res judicata* by reason of a state court judgment, and that it was time barred. Finding no merit in any of these contentions, we affirm.

Effective July 1, 1963, the profession of chiropractic came under licensure by the Regents as a result of Chap-

ter 780, *et seq.* of the New York Laws of 1963, now codified as amended in §§ 6552, *et seq.* of Title 8 of the New York Education Law. Current practitioners of chiropractic on that date were permitted to qualify under the less stringent provisions of former § 6556 of the New York Education Law. This "grandfather" provision, as it was characterized below, required passing an examination in the practice of chiropractic, and if the applicant wished to use X-ray, a further examination in its use and effect. As to current practitioners, § 6506(5) authorized waiver of "education, experience and examination requirements for a professional license . . . provided the Board of Regents shall be satisfied that the requirements of such Article have been substantially met."

Plaintiff-appellee took the special examinations intended for current practitioners and passed all subjects except chemistry and X-ray. Chemistry was mandatory, although, as noted above, a limited license excluding use of X-ray can be obtained without a passing mark in that field. Computing her test scores in the manner permitted by the New York State Education Department's regulation on grade averaging [8 N.Y.C.R.R. § 73.3] appellee's failure in the science part of the examination which includes chemistry was measured by a margin of six tenths of one percent. She received passing scores in all other subjects.

Appellee, 58 years old at the time of her hearing in the district court, was licensed to practice her profession in Maine and New Hampshire, and has also passed an examination given by the National Board of Chiropractors. On September 21, 1971, she applied for a waiver under § 6506(5) quoted above. This application was denied November 19, 1971 without a hearing, and without any statement of reasons.

As to whether the federal claim is time barred, we conclude the district court did not abuse its discretion in determining that the statute of limitations was tolled for a period commencing January 26, 1972, when appellee filed a timely proceeding in the New York State Supreme Court pursuant to Article 78 of the New York CPLR to set aside the denial of waiver by the Regents as arbitrary and capricious and order issuance of a license to practice chiropractic. That petition, which pleaded no federal constitutional claims, was granted at Special Term of the New York Supreme Court, but the order was later reversed on appeal. It was not until November 20, 1975 that the New York Court of Appeals affirmed the order of the Appellate Division of the Supreme Court holding that as a matter of state law the Board of Regents had not abused its discretion in denying the waiver. *Tomanio v. Board of Regents,* 38 N.Y.2d 724 (1975), *aff'g. mem.* 43 App.Div.2d 643 (3rd Dept. 1973). Appellee was diligent in pressing her claims. Her state litigation was initially successful. It was not until after the three year statute of limitations had expired that the state litigation was finally resolved against appellee. She filed this action on June 25, 1976, some seven months later. This Court has recognized the propriety, under such circumstances, of tolling the statute in the interests of advancing the goals of federalism. *Williams v. Walsh,* 558 F.2d 667, 674 (2d Cir. 1977); *Ornstein v. Regan,* 574 F.2d 115, 119 (2d Cir. 1978).

As the federal constitutional claim was not raised or litigated in the state proceeding, it was not barred in the federal court by the doctrine of *res judicata.*[1] *Ornstein v.*

1 Nor are we, as the dissent suggests, second guessing twelve New York appellate judges, which, were it so, would indeed be "offensive to accepted principles of federal-state comity, common

Regan, supra at 117; *Winters v. Lavine,* 574 F.2d 46 at 56-58 (2d Cir. 1978) and cases therein cited.

By its plain meaning, the waiver provision of New York State Education Law § 6506(5) is applicable to appellee's factual situation. That this is true was implicitly conceded in the opinions in appellee's state court proceedings cited above. This being so, before such a waiver could be denied to one already practicing her profession, appellee was and is, under the circumstances of this case, entitled to an adjudicative hearing before the Board of Regents, or its duly designated impartial hearing officer, and if waiver be denied, is also entitled to a statement of reasons for the denial.

Doubtless procedural due process requirements would be satisfied were licensure made dependent solely on passing a fairly written examination reasonably related to the required skills, with those who flunk cast out of their profession. In this case, those who flunk may be admitted nonetheless by waiver, the granting or withholding of which is entrusted to the Regents on statutory criteria as broad and vague as that found in *Willner v. Committee on Character and Fitness,* 373 U.S. 96 (1963). Where, as here, such broad discretionary power is granted to admit or deny entrance or continuance in a learned profession, it "must be construed to mean the exercise of a discretion to be exercised after fair investigation with such notice, hearing and opportunity to answer for the applicant as would constitute due process." *Goldsmith v. Board of Tax Appeals,* 270 U.S. 117, 123 (per Ch. Justice Taft, 1926).

sense and judicial modesty." The rule of this Court, stated in *Lombard v. Board of Education,* 502 F.2d 631, 635 (2d Cir. 1974) allows a civil rights plaintiff to split his cause of action, litigate state claims in the state court, lose, and then start all over again in federal court, asserting his constitutional or federal civil rights claims arising out of the same facts. Because, as in *Lombard,* appellee did not raise her federal constitutional rights in the state courts, none of the twelve New York judges passed on them.

The adjudicative fact to be determined in considering whether to grant a waiver is not whether Dr. Tomanio may practice her profession in New York, as she can do in Maine and New Hampshire, as a matter of grace from her sovereign or at the whim of the Regents. Rather, it is whether, notwithstanding her narrow failure of the examination, she "substantially" meets licensure requirements. Of course the state legislature need not have provided for any waiver of the examination. But once it did so, denial of the waiver implicates procedural due process rights. An adjudicative fact of such significance to appellee's interests cannot, in logic or constitutionally, be resolved without a hearing before an impartial fact finder, followed by a statement of reasons in the event of denial. This is so because the interest of a current practitioner of the healing arts in the continued practice of her profession is a property right within Fourteenth Amendment protection as defined in *Board of Regents v. Roth,* 408 U.S. 564, 572 (1972), and may also be "liberty" within the same provision. *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923). See also, *Board of Curators, University of Missouri v. Horowitz,* 435 U.S. 78 (1978) and Friendly, "Some Kind of Hearing" 123 U.Pa.L.Rev. 1267, 1296-97 (1975). The judgment appealed from merely declares such right. Whether, following an impartial hearing, appellee would be entitled to a waiver was not determined below, nor could it be in the absence of such hearing.[2]

2 The dissent notes that "plaintiff does not suggest any reason why the Board would or should grant a waiver." A logical argument can be made that since Dr. Tomanio is licensed in two other states, has practiced successfully for so many years, and passed her National Boards, she might be able to convince an impartial hearing officer that she "substantially" meets the requirements of the statute, notwithstanding her failure of the examination by six-tenths of one percent. We express no opinion on the point except that Dr. Tomanio's right to due process would seem, under these facts, independent of her likelihood of success at a hearing.

LUMBARD, *Circuit Judge* (dissenting):

I would reverse the judgment of the district court and dismiss the complaint.

Plaintiff brought this action in the United States District Court for the Northern District of New York, contending that defendants' refusal to issue a license to practice chiropractic in the State of New York deprived her of property without due process in violation of the Fourteenth Amendment. She requested an injunction directing that she be permitted to practice chiropractic in New York. Defendant answered and moved for summary judgment dismissing the complaint.

The district court awarded judgment for the plaintiff, declaring that defendant's failure to provide a hearing on plaintiff's application for a waiver of the examination requirement deprived her of her livelihood without due process. The court did not grant any affirmative relief, but issued a declaratory judgment stating that the plaintiff's due process rights had been violated and that she was entitled to an administrative hearing. Defendants appealed.

New York's chiropractic licensing statute was enacted as Chapter 781 of the Laws of 1963, to take effect July 1, 1963. Plaintiff had been practicing chiropractic since 1958. The statute provides general licensing requirements for new applicants, including, inter alia, examination requirements. The statute also includes a generous "grandfather" provision, allowing an alternative method of qualifying for persons already practicing chiropractic on the effective date of the statute. Plaintiff has taken the examinations under the less rigorous provisions of the grandfather clause on six occasions, the last time in 1971, but has never achieved a total accumlated score sufficient to pass even under this lesser standard. Plaintiff has also

aken and failed the regular licensing examination. She nevertheless remains eligible to take and pass the regular licensing examination.

After failing to pass the required examination on her seventh attempt, plaintiff applied for a waiver of the examination requirement under a general provision of the Education Law, applicable to all professions, allowing the Board of Regents, in its discretion, to waive specific requirements for licensing "provided the Board of Regents shall be satisfied that the requirements . . . have been substantially met." Education Law Section 6506, subdivision 5. This statute makes no provision for a hearing on an application for a waiver. The Board of Regents, after considering plaintiff's request for a waiver, denied her application.

Plaintiff then brought a proceeding in the state courts pursuant to Article 78 of the New York Civil Practice Law and Rules, seeking to compel the Board of Regents to waive the examination requirement in her case and to issue her a license. Supreme Court, Albany County, entered judgment for plaintiff, without opinion. The Appellate Division, Third Department, reversed in a unanimous opinion, on the ground that the authority to give a waiver is "permissive, not mandatory":

> "A review of the applicant's record on the chiropractic examinations and the fact that she failed seven examinations in as many attempts provides ample justification for the Regents' failure to exercise the discretion granted to them and removes any doubt that their action was arbitrary or capricious . . . had the board waived the requirements on record here, it would have abdicated its delegated responsibility, made our licensing provisions meaningless, and indirectly discriminated against countless numbers who

> have taken this State's licensing examinations and barely failed." 43 App. Div. 2d 643 (1973).

The Court of Appeals affirmed the Appellate Division in a second unanimous opinion, on the ground that "the refusal of the Board of Regents to waive the examination required by statute was not, as a matter of law, an abuse of discretion." 38 N.Y. 2d 724 (1975). Plaintiff then brought suit in federal court and obtained the declaratory judgment on appeal here.

The Fourteenth Amendment requires that no state "deprive any person of life, liberty, or property, without due process of law." Courts have construed this clause to mean that when the state takes a person's property, it must adhere to recognized principles of substantive and procedural law. Thus when any significant property interest, such as a person's entitlement to earn a living as a chiropractor, is taken, that person is entitled to a hearing and a right to be heard. The type of hearing that is required in a particular situation depends on all the circumstances. I would hold with the New York Court of Appeals that in the context of professional licensing, a regularly and fairly administered examination procedure satisfies plaintiff's due process right to be heard. Here the plaintiff does not challenge the fairness of the examination itself, the way in which it was given, or the way in which it was graded.

I do not believe that due process requires, in addition to a fair examination, a special hearing to determine whether the examination should be waived for applicants who have failed it. Where a law or regulation, such as the regulation setting up minimum passing grades here, has been validly promulgated for a legitimate public purpose and the complainant admittedly falls within the am-

bit of that regulation, enforcement without exceptions does not violate due process.

Even after taking account of the importance of plaintiff's property interest, the public interest in an objective and impartial method for certifying chiropractors fully justifies exclusive reliance on an examination procedure such as New York provides. Although we may sympathize with the plight of those who fail qualifying professional examinations, those examinations are required for a reasonable and valid public purpose: to determine who is qualified to practice a particular profession. In this case, the qualifying examination which the appellant has repeatedly failed is the principal means for protecting a public which cannot by itself adequately verify the credentials of those chiropractors they turn to in time of need.

That the State of New York has gone beyond the requirements of due process, as fulfilled by a fair examination, and has provided for the possibility of a waiver in the discretion of the Board of Regents, should not change the result. The addition of a waiver procedure which is not required by due process does not require a further hearing where a further hearing would not otherwise be required. Plaintiff, moreover, has not shown any unfairness either in the processing of the examination or in the decision to deny her a waiver. Plaintiff does not suggest any reason why the Board would or should grant a waiver. In short, she has not been deprived of any right by reason of not being allowed to appear before the Board.

Plaintiff might have made out a case on her right to receive a waiver, or at least on her right to a hearing before one was denied, had she shown that the state had granted waivers to others who had failed the examination

and that there were no discerible standards for distinguishing her from those who had received the waivers. But plaintiff has made no such showing. In fact, she has not shown us one case where anyone who has failed the examination has been given a waiver relieving them of the consequences. Indeed, although the waiver provision theoretically includes waivers for failure to pass the examination, it is more clearly aimed at waiver of requirements less directly related to competency, such as residence or citizenship. Accordingly, that the letter of the law was applied to appellee as the legislature contemplated does not make out arbitrary and capricous action amounting to a violation of due process.

Finally, in the absence of a violation of due process (such as does not exist here), I do not think that the federal courts should interfere with state licensing procedures—especially to require the state to hold a hearing in a case where no good reason is shown for holding one.

If we were to affirm the district court's notion that the plaintiff is entitled to a hearing, we would be suggesting resort to the federal courts whenever a state agency fails to license someone who fails to qualify. We would not only interfere with what is exclusively a state function, we would also encourage frivolous and needless litigation.

If New York opts for strict observance of its licensing laws it is not the proper business of the federal courts to decide how, if at all, strict observance should be tempered by a waiver procedure, so long as the administration of the state system does not offend equal protection. For one, two or even three federal judges to second-guess twelve New York appellate judges on a question of this nature is offensive to accepted principles of federal-state comity as well as to common sense and judicial modesty.

TOMANIO, MARY E. RECORD OF CHIROPRACTIC EXAMINATIONS

A. EXAMINATIONS UNDER FORMER EDUCATION LAW SECTION 6556.

DATE	BACT.	HYG.	CHEM.	DIAG.	PATH.	ANAT.	PHY.	PRACT.	X-RAY
4/64	(28)	(58)	(36)	(61)	(40)	(46)	(57)	(62)	(48)
12/64	(36)	(59)	(48)	(63)	(52)	(49)	(54)	(54)	(49)
66-67	(35)	(56)	(30)	(56)	(57)	(34)	(34)	(60)	(43)
6/67	(43)	(63)	(41)	77	(70)	(59)	(49)	(52)	(43)
12/67	(49)	(63)	(52)		(65)	(56)	(59)	76	(63)
5/71	75		(67)		78	77	75		(64)

B. EXAMINATION UNDER EDUCATION LAW SECTION 6554.

DATE	MICRO.	ANAL.	CHEM.	DIAG.	PATH.	ANAT.	PHY.	PRACT.	X-RAY
1/72	(62)	(52)	(41)	75	75	(71)	75	75	(55)

In The

Supreme Court of the United States

October Term, 1979

Docket No. 79-424

In the Matter of the Application
of
THE BOARD OF REGENTS of The University of the State of New York and EWALD NYQUIST, as Commissioner of Education and Chief Administrative Officer of the Education Department of the State of New York,

Petitioners,

vs.

MARY TOMANIO,

Respondent.

Respondent's Brief on Petition For Certiorari to the United States Court of Appeals For the Second Circuit

BRIEF FOR RESPONDENT

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X

Respondent's Brief On Petition For Certiorari To The United States Court of Appeals For The Second Circuit.

QUESTIONS PRESENTED FOR REVIEW

1. Does this case involve any new questions of due process not previously settled by this Court, which warrant consideration at this time?

2. In determining that the Regents should have followed due

process procedures in reaching their conclusion, did the Court of Appeals conflict with decisions of the state court as to the arbitrary and capricious nature of conclusions?

3. Does not a previous decision of this Court already support the Court of Appeals finding that the state litigation between the same parties in which the constitutional questions litigated herein were not raised, is not "res judicata" in this matter, simply because Dr. Tomanio could have raised those questions at that time?

4. Is there a conflict between various circuits concerning the tolling of statutes of limitations in civil rights actions, which requires resolution by this Court?

STATEMENT OF THE CASE

Plaintiff, a 62 year old woman, has practiced chiropractic legally in New York State since 1958. After a licensing statute was first enacted there, she took a series of examinations, all parts of which she passed, except one, which she failed by six-tenths of one percentage point. She therefore applied to the New York State Regents for a waiver of that examination requirement, which the Regents were empowered to give by a provision of the education law. The Regents refused her request without giving her a hearing or reasons for their refusal.

Dr. Tomanio then brought an Article 78 proceeding in the state court on January 26, 1972 alleging that the Regents' refusal was an arbitrary and capricious exercise of their authority. Until that time she had continued to practice legally under a "stay" granted to "grandfathers". When she began the state court action she obtained an additional "stay".

The New York State Supreme Court gave judgment for plaintiff and ordered the Education Department to issue a license to her. However, the Appellate Division reversed that judgment and that reversal was sustained by the New York Court of Appeals on November 20, 1975.

On June 25, 1976, Dr. Tomanio brought this action in the United States District Court for the Northern District of New York under the Fourteenth Amendment and the Civil Rights Act, 42 U.S.C. Section 1983, claiming that she was denied due process by the Regents when they refused her request for a waiver, without giving her a hearing or specifying reasons for their refusal. Defendants answered and moved to dismiss the action on the grounds of "res judicata", statute of limitations, and failure to state a cause of action.

The District Court denied the motion on all grounds and gave a declaratory judgment that plaintiff has been denied due process. The Court of Appeals, Second Circuit, affirmed. Defendants are now petitioning for certiorari.

SUMMARY

This case presents no new federal question deserving review by this Court. The lower courts correctly found that Dr. Tomanio's interest in continuing her long years of legal professional practice gave her a "property" and "liberty" right warranting due process before that right could be taken from her. That right to due process applied to the waiver request which is a separate procedure for obtaining licensure from the examinations, and was established by separate statute. Therefore, the District and Circuit Courts found that Dr. Tomanio was entitled to a hearing before the Regents refused her request for a waiver, and a statement of their reasons for

that refusal. In this finding those courts relied on decisions of this Court which are wholly applicable and indistinguishable in any relevant way, from the case at bar.

In finding that the Regents must, and did not, give Dr. Tomanio due process before they end her right to practice, the federal courts were not conflicting with any decisions of the state courts. The latter concerned the possible arbitrary or capricious nature of the conclusions reached by the Regents, a separate issue from the procedures employed by the Regents in reaching those conclusions, which was the constitutional matter properly considered by the federal courts herein.

No question concerning the due process of those procedures was raised in the state court litigation and there is therefore no legitimate question of "res judicata". The Regents attempt to apply that doctrine just because plaintiff could have raised those questions in the state court can not succeed in view of this Court's interpretation of the Civil Rights Act. In that interpretation this Court said that relief in the state court need not be sought before a federal civil rights action is instituted. As the Court of Appeals has stated, the only logical extension of that determination is that failure to seek such state relief can not be treated as "res judicata" in a federal civil rights suit.

And finally, there is no conflict requiring resolution among the circuit courts, concerning the policy of tolling local statutes of limitations in civil rights actions such as this one. The Second, Third and Fifth Circuits have all articulated the goal of reducing the flood of civil rights cases in the federal courts and said that that goal is served by tolling local statutes of limitations during the pendency of state actions which may give plaintiffs complete relief. They reason that, in such cases, plaintiffs, knowing they can defer the federal court action until

the outcome of the state suits, may get full relief in the state court and never institute the federal action. There is no indication that any circuit differs with this policy, including the First Circuit which was not dealing with federal tolling policy in the case cited, but rather with the correct interpretation of a local tolling statute. Moreover, even in that case, the Court of Appeals recognized that the fundamental policy of the Circuits is to defer to the discretion of the District Court Judges, as was done by the Court of Appeals in this case, after determining that the facts, including Dr. Tomanio's diligence in seeking relief, warranted the lower court finding.

POINT 1

THE CASE PRESENTS NO NEW FEDERAL QUESTION AND THE LOWER COURT FINDINGS WERE BASED ON APPLICABLE DECISIONS OF THIS COURT.

The Regents have attempted to support their claim that this case presents a new question for this Court which warrants certiorari, by distinguishing it from *Board of Regents v. Roth*, 408 U.S. 564 (1972) in the following three respects, which are irrelevant and or erroneous:

1. The fact that the failure to give due process in this instance preceded the *Roth* decision is without significance because (a) even now the Regents refuse to try to correct their error by granting Dr. Tomanio due process as directed by the District Court; (b) justiciability demands that, in every case decided by this Court, injury precede the action, and the decisions therefore must affect prior acts; and (c) the right to a due process hearing before denial of even admission to a profession, much less retention of the right to practice it, was

established long before *Roth* by this Court in *Willner v. Committee on Character*, 373 U.S. 96, 105 (1962). And Chief Justice Burger made clear the requirement for such due process before "debarment" from livelihood in *Gonzalez v. Freeman*, 334 F.2d 570, 579 (D.C. Cir. 1964). Further, the District and Circuit Court decisions were based not only on the factual finding that Dr. Tomanio's long years of practice give her a "property" interest deserving due process protection under the policies set forth in *Roth* (408 U.S. at 577, 578); but that she also has a "liberty" interest (A-6, B-6)* warranting due process pursuant to *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), which found that the Constitution protects its citizens' freedom to engage in the occupations they choose.

2. This Court has never made a request for a hearing a prerequisite to the application of the due process doctrine where that doctrine mandated a hearing. In fact, this Court has made it particularly clear that such a request is not necessary, by its decisions that, in order to meet the demands of due process, persons threatened with injury to property and/or liberty, must be given notice of the hearing so that they can avail themselves of the opportunity to be heard. *Goss v. Lopez*, 419 U.S. 565, 579, (1975); *Memphis Light v. Craft*, 436 U.S. 1, 13 (1978). If hearings only followed a request for them, the Court would have no reason for such concern that they might take place without the subject's knowledge.

3. Whether or not Dr. Tomanio would receive her license after a hearing is irrelevant. As the Circuit Court said (A-6):

> "A logical argument can be made that since Dr. Tomanio is licensed in two other states, has practiced successfully for so many years, and passed her National Boards, she might be able to convince an impartial hearing officer that she "substantially" meets the requirements of the statute, notwithstanding her failure of the examination by six-tenths of one percent. We express no opinion on the point except that Dr. Tomanio's right to due process would seem, under these facts, independent of her likelihood of success at a hearing."

*References in ( ) are to Petitioner's Appendices and pages thereof.

The lower courts' findings that the prospective outcome of a due process hearing has no effect on the subject's right to it, is supported by the applicable decisions of this Court. *Carey v. Piphus*, 435 U.S. 247, 266 (1978); *Fuentes v. Shevin*, 407 U.S. 67, 87 (1972); *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424 (1915).

The Regents' argument also ignores the facet of both lower court decisions which found additional lack of due process in the failure to give Dr. Tomanio reasons for the refusal of her application for a waiver (A-6, B-8). Those lower court findings were thoroughly grounded on the opinions of this Court. *Perry v. Sindermann*, 408 U.S. 593, 601 (1972); *Willner*, at 105. The significance of that failure was set forth in the Circuit Court briefs when, for the first time, the Regents offered a reason for refusal of the waiver, stating it was not their policy to grant same to any except out of state applicants. Dr. Tomanio believes that the legislative history of New York Educational Law Section 6506 (F-5, F-6) indicates that such a policy perverts the legislative intent. Had that reason been given to Dr. Tomanio when the waiver was refused, the propriety of the Regents' policy could have been, and would have been, litigated in state court action.

Further, there is no merit in the contention of the petition for certiorari that this Court's grants and refusals of relief in cases such as this one, has been based on whether a disciplinary procedure was involved. *Willner*, which accorded relief to an applicant for admission to the bar, refutes that position. And as for the cases cited by the Regents to substantiate it, (a) this Court distinguished between *Roth* and *Perry* not on any discipline concept, but because in the first they found no "property" interest where an untenured teacher's contract was not renewed (*Roth* at 577); and in the second, they felt that a possible "de facto" tenure might have created such a "property" interest (*Perry* at 601); (b) in *Matthews v. Eldridge*, 424 U.S. 319, 349 (1976), this Court acknowledged a due process right to a hearing, but felt the administrative procedures provided an adequate one; and (c) in *Leis v. Flynt*, 99 S.Ct. 698, 701 (1979), the Court found that attorneys admitted in one state had no "property" right to practice law in a sister state. The latter is vastly different than the facts herein on which a "property" interest worthy of due process protection was found by the lower courts, at least partly because Dr. Tomanio is threatened with debarment from a professional practice by which she has supported her family for many years. Even if the element of "opprobrium" which the Regents erroneously claim was determinative in the cases they cite, were required, such debarment would surely satisfy that criteria. But the truly critical factors here were expressed by Justice Marshall in *Board of Curators, University of Missouri v. Horowitz*, 435 U.S. 78, 100 (1978):

> "...when the State seeks 'to deprive a person of a way of life to which she has devoted years of preparation and on which she has come to rely', it should be required first to provide a 'high level of procedural protection' "

The Regents repeatedly stress that Dr. Tomanio has not passed her licensure examination. That has little to do with the matters at issue here. The New York State Legislature specifically provided an alternative way of becoming licensed, other than by passing that examination. That alternative (F-5) involved an application for a waiver and the grant or refusal of same by the Regents. As both lower courts found, in the implementation of that alternative, the Regents had the constitutional duty to follow due process procedures, particularly where, as in this instance, a long-practicing chiropractor had so much at stake that it amounted to a "property" and "liberty" interest. In that duty, the Regents failed.

POINT 2

IN MANDATING THAT NEW YORK STATE EDUCATION LAW SECTION 6506 MUST BE ADMINISTERED WITH CONSTITUTIONAL PROCEDURES THE COURT OF APPEALS DID NOT CONFLICT WITH STATE COURT DECISIONS AS TO THE ARBITRARY AND CAPRICIOUS NATURE OF THE REGENTS' CONCLUSIONS

Both the Court of Appeals and the District Court took great care to refrain from indicating whether or not the Regents should grant the waiver requested by Dr. Tomanio (A-6, B-13). They acknowledged that only the New York State courts could determine whether the Regents' conclusion was correct. But the federal courts did properly utilize their authority to determine whether or not the procedures employed by the Regents in reaching that conclusion were constitutional. The latter is a wholly separate question which was not raised before this action, has not been decided by any

state court, and is surely within the proper province of the federal courts.

The Regents further protest that the requirements of due process would be inconvenient for them to administer. This was considered and rejected by the lower courts. Apart from the District Court's fact finding that due process would impose no great "burden" on the state (B-8), this Court has not allowed administrative agencies to cavalierly dismiss due process with such claims. As Justice White said in *Stanley v. Illinois*, 405 U.S. 645, 656 (1972):

> "But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones."

POINT 3

THIS COURT HAS ALREADY REVIEWED THE ISSUE OF "RES JUDICATA" RAISED BY THE REGENTS AND ITS DECISION WAS THE BASIS OF THE CIRCUIT COURT'S HOLDING

As previously set forth, the matter of due process at issue here was not raised in the prior state court litigation. The petition for certiorari acknowledges that, but claims that Dr. Tomanio should be barred from raising the issue in the federal court because she could have raised it in the state court. Both

the District and Circuit Courts rejected that notion (A-4, B-5), citing prior decisions in *Ornstein v. Regan*, 574 F.2d 115, 117 (2d Cir. 1978) and *Lombard v. Board of Education*, 502 F.2d 631, 635 (2d Cir. 1974) and other cases. In both *Ornstein* and *Lombard*, the courts based their holdings on this Court's interpretation of the Civil Rights Act in *Monroe v. Pape*, 365 U.S. 167, 183 (1961), in which the Supreme Court ruled that an action under 42 U.S.C. Section 1983 (F-7) could be brought without first seeking relief in the state court. As the Second Circuit reasoned in *Ornstein* and *Lombard*, if there is no requirement that a civil rights action be brought in the state court before such an action is started in federal court, how can the failure to seek that remedy in the state court be treated as "res judicata" in the federal proceeding?

POINT 4

THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE POLICY OF TOLLING LOCAL STATUTES OF LIMITATION IN SITUATIONS LIKE THIS

The petition for certiorari asks this Court to review the matter herein on a claim that the Court of Appeals decision that the New York statute of limitations was tolled during Dr. Tomanio's state litigation, is at odds with the policy in the First Circuit. That is not true. It is true that in the one case cited by the Regents, *Ramirez de Arellano v. Alvarez de Choudens*, 575 F.2d 315 (1978), the First Circuit refused to find that the Puerto Rican statute of limitations was tolled. But that refusal was based predominantly on their interpretation of the local tolling statute, not as here, on federal common law tolling policy.

Even in *Ramirez* 575 F.2d at 318, the First Circuit stated

that the basic policy relating to statutes of limitations is to respect the District Court's discretionary right to make the decision. In this case, the Circuit Court articulated the same policy, restricting their finding on this point to a statement that "the district court did not abuse its discretion" (A-4). The Court of Appeals did reiterate the facts which supported the tolling determination (A-4): namely, that Dr. Tomanio had first been granted complete relief by the state supreme court on non-constitutional grounds, and had lost that relief only after successive appeals in the state courts, by which time the applicable three-year statute of limitations had run; and that she thereupon promptly brought suit in federal court on new constitutional grounds.

The policy of allowing the District Court Judge the discretion to find the local statute of limitations tolled in civil rights actions where, as here, a plaintiff may thereby obtain complete relief in the state court and obviate the need to bring a federal action, has been endorsed by both the Fifth Circuit, in *Mizell v. North Broward Hospital District,* 427 F.2d 468, 474 (1970) and the Third Circuit, in *Ammlung v. City of Chester,* 494 F.2d 811, 816 (1974). We submit that there is no conflict among the circuits to be resolved by this Court.

Further, contrary to the Regents' contention, to permit such tolling advances a goal of this Court, the interest of federalism, by reducing the caseload of the federal courts. For, only if a plaintiff is assured of not losing his right to turn to the federal court for relief, will he refrain from bringing such an action until his state litigation is over. And, thus, if he is successful in the state court, he will not have to start a federal suit at all.

CONCLUSION

There is no merit to the Regents' contentions of a new federal question, of conflict with state court decisions, and of need to review "res judicata" and tolling policies, and the petition for certiorari should therefore be denied.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

DOCKET NO.

79-424

In the Matter of the Application

of

THE BOARD OF REGENTS of the University of the State of New York and EWALD NYQUIST, as Commissioner of Education and Chief Administrative Officer of the Education Department of the State of New York,

Petitioners,

vs.

MARY TOMANIO,

Respondent,

ON CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

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Citations to Opinions Below

The majority and dissenting opinions of the Circuit Court of Appeals for the Second Circuit are reported in 603 F.2d 255 et seq. and are printed in the Appendix at pages A-55-65. The decision of the United States District Court for the Northern District of New York was not officially reported, and appears in the Appendix at pages A-41-54.

Prior state court litigation between these parties, relevant to this case, culminated in a unanimous decision of the New York State Court of Appeals, reported

in 38 NY 2d 724, 343 N.E. 2d 755, and printed in the Appendix at pages A-9-11. The Court of Appeals there affirmed a unanimous decision of the Appellate Division of the New York State Supreme Court, reported in 43 AD 2d 643, and printed in the Appendix at pages A-5-8 which decision reversed a judgment of the New York State Supreme Court, rendered at Special Term without any written or recorded opinion.

Jurisdiction

The judgment sought to be reviewed was entered by the United States Court of Appeals for the Second Circuit on June 19, 1979. It affirmed so much of a judgment of the United States District Court for the Northern District of New York entered August 5, 1978, as awarded declaratory judgment for respondent under 42 U.S.C. §1983 determining that her civil rights had been violated by failure to offer a hearing, and as dismissed the defenses of res judicata and of the statute of limitations. No cross appeal had been filed by respondent from other parts of the judgment of the District Court.

A petition for certiorari was filed September 14, 1979 pursuant to 28 U.S.C. §1254, and was granted by order of this Court, dated November 5, 1979.

Constitutional and Statutory Provisions Involved

The constitutional and statutory provisions involved in this case are set forth in the appendix hereto and are the following:

United States Constitution Amendment 14, §1 (pages A-1).

28 U.S.C. §1738 (page A-2).

42 U.S.C. §1983 (page A-3).

Former New York Education Law provisions providing Special Examinations for "Grandfather" Chiropractors, §6556 (page A-4).

New York Education Law §6551, subdivision 1 defining chiropractic (page A-7).

New York Education Law §6506 authorizing the Board of Regents to waive specific requirements in any profession or to enclose licenses of other jurisdictions (page A-8).

Former New York Statutory Provisions replaced effective September 1, 1971 by §6506, set forth above §211 (page A-9).

Section 6553 (page A-11).

Questions Presented

1. On the facts in this case was it an error to hold that due process requires the offer of a hearing?

2. Did the Court below fail to give proper faith and credit to the interpretation of state statutes by the New York courts?

3. Did the Court below err in refusing to dismiss the complaint on the defenses of res judicata and failure to comply with the statute of limitations?

Statement of Case

The initial chiropractic licensing statute was enacted in New York as Chapter 781 of the Laws of 1963, effective July 1, 1963. The statute, as amended, set forth general licensing requirements including an examination. It also included an alternative method of qualification for current practitioners, who were given six chances to pass a special examination designed to

test their understanding of fundamental concepts and also to take into account their experience in actual practice (former New York Education Law section 6556, (set forth in the Appendix hereto at p. a-4). Respondent took the special examination six times and failed it each time. She then took the regular licensing examination and failed it. A record of her marks on these seven examinations appears at page A-56. She remains eligible to take and pass the regular licensing examination, but has not attempted it since 1972.

After failing to meet the requirements of the chiropractic licensing statute, respondent applied for a waiver of the examination requirement under a separate provision of the Education Law, applicable to all professions, authorizing the waiver of specific licensing requirements "provided the board of regents shall be satisfied that the requirements . . . have been substantially met" (Education Law section 6506 subdivision 5) (Appendix hereto p.-8). That application was based upon respondent's assertions that she had "almost" passed the examination, that she was licensed in two other states (Maine and New Hampshire), and that she had passed an examination given by the National Board of Chiropractic Examiners, at that time a private organization without official status in New York State (R-Exhibit A to Appendix to Ct. of App. pp. 24-32). The application for a waiver of the licensing examination was denied and respondent was so notified by a letter dated November 22, 1971 (id p. 33). The denial was based upon the conclusions that almost passing an examination is not the substantial equivalent of passing it, that the licensure requirements in Maine and New Hampshire were not substantially equivalent to those in New York, and that the National Board Examination was not substantially equivalent to the examination required by the New York statutes. These reasons were fully set forth in writing in an affidavit of the Executive Secretary of the State Board for Chiropractic, dated February 3, 1972, and in later papers in the state court proceedings, (id. p. 46-7).

Respondent instituted state court proceedings to compel the waiver of the examination requirement and the issuance of a license. The Court of original jurisdiction, New York Supreme Court, County of Albany, granted judgment for respondent from the bench without any written opinion. The Appellate Division of the Supreme Court, Third Judicial Department unanimously reversed, on an opinion reported in 43 AD 2d 643 (and set forth at A-5-8). The New York State Court of Appeals unanimously affirmed the dismissal of respondent's petition, on an opinion published in 38 N.Y. 2d 724 (A-9-11), and entered judgment on November 21, 1975.

In June 1976, over four and one-half years after the determination, and seven months after the final judgment of the New York State Court of Appeals, respondent commenced this action in the United States District Court for the Northern District of New York, contending that the refusal of petitioners to issue a license to practice chiropractic in the State of New York was a violation of her civil rights. The relief requested was an injunction permitting her to practice chiropractic in New York State. Petitioners answered and moved for summary judgment dismissing the complaint.

Respondent alleged Federal jurisdiction under the 14th and 5th Amendments, 28 U.S.C. sections 1331, 1343, 2201, and 2202 and 42 U.S.C. section 1983. The decisions of the Courts below apparently sustained jurisdiction under the 14th Amendment, 28 U.S.C. section 1331 and 42 U.S.C. section 1983.

The District Court awarded judgment partially in favor of the respondent, declaring that the failure of petitioners to offer her a hearing on her application for a waiver of the examination requirement constituted a denial of due process. The Court refused to order the issuance of a license or to grant any injunctive relief. The Court also rejected the defense that the action was time-barred and the defense of res judicata (A-41-54).

Petitioners appealed from so much of the judgment as dismissed the defenses of the statute of limitations and of res judicata and declared that petitioners had violated respondent's constitutional rights.

No cross appeal was filed by respondent.

The Court of Appeals for the Second Circuit affirmed, with Circuit Judge LUMBARD dissenting (A-55-65).

This Court granted petitioners' petition for certiorari.

Summary of Argument

An applicant for a license to practice chiropractic who fails seven licensing examinations is not entitled, as a matter of constitutional due process, to a hearing on an application to waive the examination requirement. Especially, where there is no issue of fact, and where it would be an abuse of the licensing agency's discretion, under state law, to grant the application and waive the examination.

Any previous "right" or reasonable expectation of a right to continue practice ended when respondent failed to pass the examination required by the specific licensing statutes. Her subsequent application for a waiver of the examination requirement was made under a general statute authorizing discretionary waiver of specific requirements which had been substantially met. Determination of that application on the undisputed documentary evidence and written arguments submitted by her counsel constituted all the process due her under the Constitution.

The application for waiver of the examination requirement was based on a New York statute, Education Law section 6506. The petitioners, the New York agency responsible for administering that statute, and the New York courts, have consistently interpreted that statute as not intended to excuse failures on licensing examinations. Petitioners therefore argue that the

Courts below erroneously ignored the construction placed on this statute by the New York courts.

The issue of respondent's right to practice chiropractic in New York and to licensure was the subject of prior litigation by her against petitioners in the New York courts. It culminated in unanimous judgments against her in the two New York appellate courts. This action should have been barred under the principle of res judicata. It should also have been barred because of respondent's failure to commence it within the three year statute of limitations.

Petitioners further contend that the Courts below erred in not giving full faith and credit to the provisions of the New York statutes and judicial interpretation of those statutes, and in postulating and applying a federal exception to res judicata on the facts of this case, and in tolling the statute of limitations.

ARGUMENT

POINT I

THE DECLARATORY JUDGMENT THAT DUE PROCESS REQUIRED A HEARING ON THE FACTS OF THIS CASE WAS IN ERROR.

Any consideration of what process is "due" should begin with an analysis of what is being decided. The Court below perceived this to be a case in which petitioners had taken action which deprived respondent of property or liberty. It misconstrued both the nature of the administrative determination by petitioners and the meaning and relevance of the State statutes under which respondent's application was made. Point II will discuss the misinterpretation of the State statutes which we contend occurred. This point will deal with the declaration that "due process", as applied to the factual situation presented in this case, required that respondent be offered a hearing, a declaration which we submit was also erroneous.

When minimum standards for licensure were imposed by the licensing act of 1963, the constitutionality of the new requirements and of their application to present practitioners, including respondent, was litigated, and the licensing act was sustained (Wasmuth v. Allen, 14 NY 2d 391, app. dism. 379 U.S. 11 [1964, per curium]). Although the State had never affirmatively conferred a right to practice upon respondent, we freely concede that the continuation of the practice she had begun in the absence of any State action or limitation was something valuable to her, and could not be taken away in an arbitrary or capricious manner. She was entitled to some form of procedural due process. This was fully provided by the impartial administration of the series of special examinations. All three of the judges of the Circuit Court agreed that requiring respondent to pass a competency examination was not a violation of her civil rights.

The majority of the Court below erred, however, in holding that due process required a hearing on her later application for a waiver of the examination requirement which she had proven herself unable to fulfill. Even assuming that the waiver statute could be applied to excuse failures on licensing examinations*, the determination on the undisputed facts of this case, that such an application required a hearing, would still be in error.

First, we contend that respondent's "right" to continue to practice chiropractic was terminated by her failure to pass the examination required by the chiropractic licensing statute, and had terminated before she made her later application for a waiver of the examination.

*As stated, that assumption is contended to be erroneous as set forth in Point II, supra.

Respondent's initial application for licensure was submitted February 27, 1964. She was entitled to admission to a special limited series of examinations for persons practicing prior to the enactment of the licensing statute. She completed that series of six examinations given between 1964 and 1971, and failed to pass (A-56).

At the conclusion of the grading of the last of the series of special examinations she was notified that she had failed to qualify for licensure and would have to discontinue the practice of chiropractic. That notice was given by a letter dated September 15, 1971 (R-Exhibit A to app. to Cir. Ct., p. 34). No timely action to review that determination was commenced in state or in federal court. Her case was closed. She could still qualify by passing the regular licensing examination, and she made one unsuccessful attempt to do so. She is still free to take that exam, but has chosen not to try again.

Instead she filed a new application under a different statute, discussed in detail in Point II. We submit that this new application did not revive any "right" to continue to practice, or relieve respondent of the consequences of her failure to meet the statutory licensing requirements.

The majority of the Court below cited Board of Curators, University of Missouri v. Horowitz (435 U.S. 78 [1978]) in support of its decision. However, we submit that the principles stated by this Court in that case, and in Leis v. Flynt, ____ U.S. ____, 58 L. Ed. 2d 717, (1979) support the position of petitioners and of the dissenting Judge in the Circuit Court.

As this Court noted in Leis v. Flynt, supra, at 58 L. Ed. page 721:

> "the Constitution does not create property interests. Rather it extends various procedural safe-

> guards to certain interests 'that stem from an independent source such as state law.' "

This Court there found that the laws of Ohio authorizing Ohio courts, in their discretion, to permit out of state lawyers to appear pro hac vice did not confer a property right, and that no hearing was required on such an application. Particularly appropriate to the instant case is the language (58 L. Ed. 2d at p. 722):

> "A claim of entitlement under state law, to be enforceable, must be derived from statute or legal rule or through a mutually explicit understanding. [citation omitted] * * * Even if, as the Court of Appeals believed, respondents has 'reasonable expectations of professional service,' [citation omitted] they have not shown the requisite mutual understanding that they would be permitted to represent their clients in any particular case in the Ohio courts."

Here, as in Leis v. Flynt, supra an application was made addressed to the discretion of the State agency. Here, as there, the State had never previously conferred the "right" in question by statute, legal rule, or mutually explicit understanding. Prior to the enactment of the chiropractic licensing statute in 1963 New York generally ignored the practice of chiropractic. The State did not authorize, regulate, or prohibit such practice. Respondent's prior practice as a chiropractor did not give her any expectation that she would be able to continue to practice without having to meet any reasonable requirements for licensure which might thereafter be imposed by the State for the protection of the health and welfare of its citizens (Wasmuth v. Allen, supra).

The most she had was an expectation that any licensure requirements would be reasonable and that she would have a fair chance to meet them. She had that chance. She certainly never had any reason to believe that if she could not meet the requirements New York would waive them just for her, so that she could continue to practice. There was no "statute, legal rule or mutually explicit understanding" that she would be exempted from any licensing requirement, and certainly not excused from her inability to pass the licensing examination. Under this situation the rule stated in Leis v. Flynt, supra should be applied and this Court should hold that, after her failure on the examinations, respondent had no property right which could require a hearing on her application for waiver of the examination requirement.

In Board of Curators, University of Missouri v. Horowitz, supra the state action was based on the failure of an applicant to meet an academic requirement. This Court found that due process did not require a hearing to review an academic determination. The use of professional examinations to determine eligibility for the practice of a profession is also an academic determination, and it is not the adversary type of dispute in which the Court had found hearings to be required by due process. The distinction between academic and disciplinary actions, recognized in Board of Curators, University of Missouri v. Horowitz, supra should be applied in this case also.

Second, even assuming that respondent still had a protected property right after her failure to meet the statutory requirements for a license, the nature of her application for waiver of the examination requirement was not such process as to require a hearing in order to constitute "due process".

Respondent based her request for waiver of the licensing examination on her narrow margin of failure on the last of the six special examinations, her years of practice and the fact that she was licensed in two other

states and had passed an examination given by a voluntary organization. There was no dispute as to any of those facts. She was represented by an attorney, and had the opportunity to submit any written material she wished in support of her application. She relied on three letters from her attorney and evidence of her out of state licenses and the private examination (R-Exhibit A to app. to Cir. Ct., pp. 24-32). She did not request a hearing, no statute required one, and the decisions of this court in Board of Regents v. Roth, 408 U.S. 564 (1972) and the succeeding cases were all in the future. The administrative record upon which the petitioners' determination was made consisted entirely of the material submitted by respondent's attorney and her record on the licensing examinations. There were no hostile witnesses to be cross-examined, no conflicting evidence to be refuted. The situation is analogous to a court case which can be decided on the pleadings or on a motion for summary judgment. Judicial due process does not require a trial where there is no triable issue of fact, and the Courts below have erred in holding that administrative due process requires a hearing even where there is no contested issue of fact and an applicant, represented by an attorney, has not even requested one.

There is a clear distinction between cases in which the State or a private party moves to terminate a right to liberty or property which it has conferred and which the holder reasonably assumes to be a continuing right, and cases, such as this one, where the right is subject to the holder meeting and maintaining standards of eligibility. The former cases involve action of a disciplinary nature, and a due process hearing is required (Perry v. Sinderman, 408 U.S. 593 [1972]; Morrisey v. Brewer, 408 U.S. 471 [1972]; Goss v. Lopez, 419 U.S. 565, [1975]). The latter type of cases involve failure to qualify for a right or to meet the standards for its continued exercise, without any allegation of misconduct or any aura of discipline or opprobrium. In these cases no such due process hearing is required (Board of Regents v. Roth, supra; Mathews v. Eldridge,

424 U.S. 319, [1976]; Leis v. Flynt, supra; Spady v. Mount Vernon Housing Authority, 34 NY 2d 573, 310 N.E. 2d 542, cert. den. 419 U.S. 983 [1974]).

The issue of a hearing in cases of this nature is an important one to petitioners and to other licensing agencies. Affirmance of the holding of the Court below would seriously impair and unnecessarily prolong and complicate the State's exercise of its police power to protect citizens by insuring high standards of competence for professional licensees, and by using objective and fair licensing examinations to achieve that purpose.

The District Court did not regard its holding on this as a matter of general concern to the petitioners. The decision itself seeks to narrow the scope of the holding, by limiting it to "grandfather" applicants for licensure, and the Court notes that "there is no indication in the record that the burden to be borne by the State in providing some form of hearing to applicants such as respondent would be of insurmountable magnitude" (A-48). The complaint had not asked for a hearing, but for an order granting a license and restraining criminal prosecution. The answer met those issues, and the District Court properly denied those requests. No appeal or cross-appeal was filed by respondent. However, the declaration that a hearing should have been offered, while it gave no real sustenance to respondent, does raise a potentially serious problem and is indeed a matter of general concern to petitioners. We are now faced with a decision that any "grandfather" applicant who fails to meet the statutory requirements for the issuance of a license, and who then applies for a waiver of those requirements under New York State Education Law section 6506, must be given a hearing.

Such a rule would apply to hundreds of applicants who have previously been practicing professions for which licensure requirements are first imposed. The Legislature and the Governor have approved new pro-

fessional licensing statutes for several professions in recent years, including, for example, speech pathology, audiology, occupational therapy and animal health technology. The licensing statutes in these professions all became effective in 1976 and each provides a special means of qualification for "grandfather" applicants (see New York Education Law sections 8208, 7907 and 6611, subdivision 4). Another four professional groups, namely masseurs, certified social workers, physician's assistants and specialist's assistants, have also been made subject to licensing requirements in the present decade.

Every session of the New York State Legislature considers bills for the licensing of additional professional groups. Such bills routinely include special provisions for current practitioners. In addition, the Legislature has given serious consideration to the comprehensive revision of the provisions of New York Education Law Article 153, relating to the practice of psychology. The existing statutes do not limit the practice, but only the use of the professional title. Enactment of any one of several proposed revisions of this statute to limit the practice of psychology and/or of related types of counseling services would involve "grandfather" licensing provisions applicable to a large number of applicants. Consequently this aspect of the decision of the Courts below is a matter of serious import to the petitioners.

Common sense and due process considerations alike dictate the conclusion that no hearing was required on respondent's application for waiver of her examination failures.

POINT II

THE COURT OF APPEALS FOR THE SECOND CIRCUIT HAS INTERPRETED A NEW YORK STATE STATUTE (EDUCATION LAW SECTION 6506) IN A MANNER CONTRARY TO THE INTERPRETATION OF THE SAME STATUTE, ON THE SAME FACTS, BY THE HIGHEST COURT OF THE STATE OF NEW YORK, AND HAS VIOLATED ACCEPTED PRINCIPLES OF FEDERAL-STATE COMITY.

The lower Federal courts, as Judge LUMBARD noted in his dissent, have violated accepted principles of federal-state comity. They have failed to give proper weight to the interpretation of state statutes and procedural requirements in three respects. This point deals with the failure to properly take into account the interpretation of New York Education Law section 6506, subdivision 6 as uniformly applied by the State agency responsible for administering it and by the State Courts. The failure to apply state law relating to the defense of res judicata and the statute of limitations will be dealt with in Point III, post.

The details relating to the waiver application are fully stated in the statement of the case, at page 4 supra. The application was made September 21, 1971.

The waiver provision, present section 6506, subdivision 5 of the New York Education Law, provides that:

> "Section 6506. Supervision by the board of regents. The board of regents shall supervise the admission to and the practice of the professions. In supervising, the board of regents may:
>
> * * *
>
> (5) Waive education, experience and examination requirements for a professional licensee prescribed in the article relating to

> the profession, provided the board of regents shall be satisfied that the requirements of such article have been substantially met;

The former provision, replaced by section 6506 effective September 21, 1971, was set forth in section 211 of the New York Education Law as subdivision 2 and reads as follows:

> "2. The regents may by rule or order accept evidence of preliminary and professional education, and where practice is a prerequisite to licensure may receive evidence of such practice in whatever state or county the same may have been obtained or engaged in, for licensing a candidate to practice any such profession in lieu of that prescribed by the laws relating to such profession; provided it shall appear to the satisfaction of the regents that such candidate has substantially met the requirements of such laws."

At least since 1939 the New York appellate courts have recognized that these provisions should be applied sparingly, and are not intended to excuse individual applicants from specific licensing requirements which they cannot meet.

In Matter of Erlanger (256 App. Div. 447 [1939] aff'd sub nom.; Matter of Levi v. University of the State of New York, 281 NY 627) cited by the New York State Court of Appeals in its affirmance of the decision of the Appellate Division in favor of petitioners in this case, the Court said: "The Regents may not legally, through the exercise of the remedial power conferred by this section, admit to the profession those who have

not met the requirements the Legislature has established. If they err at all, it should be on the side of the protection of the public" (256 App. Div. at p. 447).

Respondent's effort to extend the purpose of the waiver statute to excuse her inability to pass the licensing examination was rejected by all eleven of the State appellate court judges. The Appellate Division noted that:

> "Had the board waived the requirements on the record here, it would have abdicated its delegated responsibility, made our licensing provisions meaningless, and indirectly discriminated against the countless numbers who have taken this State's licensing examination and barely failed."

The Court of Appeals unanimously affirmed that decision. Yet the Federal lower courts have totally ignored this interpretation of the key New York statute by petitioners and by the New York Courts, and have substituted their view of what New York law should be for what it actually is, as Judge LUMBARD noted in his dissent below.

The general provision authorizing the waiver of specific licensure provisions in exceptional circumstances serves an equitable purpose. It permits, for example, the licensure of applicants coming to New York who can establish that their education or experience is substantially equivalent to that specifically required by the New York licensing laws and regulations, although some subjects may be different or standards for supervised training may be somewhat different. Without the occasional leeway this statute provides, such applicants would be required to repeat professional education and experience. Section 6506, subdivision 5 provides for the waiver of insubstantial deviations from New York requirements, and subdivi-

sion 6 provides for the indorsement of out-of-state licenses, granted upon equivalent licensing standards. Neither is a means of excusing failure to meet the requirements.

The New York courts held, as a matter of law, that section 6506 did not confer discretion on appellants to waive the examination requirement for appellee. Respondent admits that the statute has not been applied to excuse examination failures, and that fact is proven in the record (Complaint, para. 15, at A-16; answer para. 14 at A-23; interrogatory, answer no. 23 at A-32). The Courts below erred in ignoring New York's clear and consistent interpretation of the purpose and scope of the waiver statute. In substituting their view of what New York law should be for the unanimous opinion of the two New York appellate courts as to what it actually is, the Courts below have in effect rewritten a New York statute and served as an appellate court over the New York Court of Appeals in the interpretation of a state statute. By so doing they have, as Judge LUMBARD said, violated "accepted principles of federal-state comity as well as common sense and judicial modesty" and, we add, the exclusive appellate jurisdiction of this Court under 28 U.S.C. section 1257 and the full faith and credit due state statutes and judicial proceedings under 28 U.S.C. section 1738.

POINT III

THE DEFENSES OF RES JUDICATA AND THE STATUTE OF LIMITATIONS SHOULD HAVE BEEN SUSTAINED AND THIS ACTION SHOULD HAVE BEEN DISMISSED.

The Court of Appeals for the Second Circuit has adopted extremely limited interpretations of the applicability of the defenses of res judicata and of statutes of limitations in actions alleging civil rights violations under 42 U.S.C. §1983. In applying those interpretations

to the facts of this case the Second Circuit has in effect, constituted the Federal District and Circuit Courts as appellate courts for the review of a determination of the New York State Court of Appeals, in violation of 28 U.S.C. §1257, and it has failed to apply New York State procedural law, in violation of 28 U.S.C. §1738. The policies of the Second Circuit, as applied in this case, were not necessary for the purposes of the Federal Civil Rights Act, and have the undesireable effect of promoting and prolonging unnecessary litigation, adding to the docket problems of the Federal courts and depriving other litigants of prompt resolution of their claims. The interpretation of the Second Circuit in refusing to apply the defense of res judicata and the statute of limitations to civil rights actions is contrary to the interpretation placed upon these rules by other circuits. For all of these reasons this case presents a proper instance for the exercise by this Court of its supervisory responsibility over the lower Federal courts.

Before discussing the specific rules and their applicability to the peculiar facts of this case, it should be emphasized that it is petitioners' position that these defenses should be considered on the basis of the issues raised by the pleadings before the District Court, and not simply on the basis of the eventual holding of that Court and of the majority of the Second Circuit (i.e. on the action as presented, not as decided). This was an action to compel the Board of Regents to license Mary Tomanio as a chiropractor, and to restrain a criminal prosecution of her for practicing without a license pending the final resolution of the case. Licensure and injunctive relief was the real relief she requested in her complaint. That was the same relief requested by her in her prior State court proceeding. The case sought to be made by respondent was based upon the claim that the Board of Regents had never applied a State statute authorizing the waiver of licensure requirements, and that its failure to do so, and to establish "fair review procedures" for the application of the waiver statute had deprived her of due process of law. The Courts

below denied respondent all of the substantive relief she requested, and gave her instead the empty (for her personally) victory of declaratory relief that she should have been offered a hearing. The defenses of res judicata and the statute of limitations should have been applied, however, since the basic cause of action was the same as in the prior State court proceedings and since all of the issues raised in this action were or could have been raised in the State court proceeding.

A. RES JUDICATA

The defense of res judicata, in New York State, is a bar to any issue which was or could have been raised in a prior case between the same parties (Winters v. Lavine, 574 F 2d 46, 55-56; and cases cited therein [2nd Cir. 1978]). Under the mandate of 28 U.S.C. §1257, the same rule should be applied by the Federal courts to New York cases. However, in cases sought to be brought under 42 U.S.C. §1983, the Second Circuit has restricted the defense to issues actually raised in the prior case, and has postulated a "general federal law of res judicata" (Winters v. Lavine, supra at p. 56; Lombard v. Board of Education, 502 F 2d 631 (2d Cir. 1974); cert. den. 420 U.S. 976).

The extent to which the defense of res judicata should be applied to Federal civil rights cases following state court proceedings is a question as yet unanswered by this Court, and answered in various and contradictory ways by the lower Federal courts. The confusion and uncertainty has been sufficient to prompt several excellent articles in the legal periodicals (See, e.g. Res Judicata: The Neglected Defense, by David B. Currie, The University of Chicago Law Review, Vol. 45 p. 317-50; Developments in the Law, section 1983 and Federalism, Harvard Law Review, Vol. 90 pp. 1330-54; Res Judicata in Civil Rights Act Cases: An Introduction to the Problem, by William H. Thies, Northwestern University Law Review, Vol. 70, pp. 859-81). In Winters v. Lavine, the Second Circuit itself discussed at great

length the problem and the many conflicting cases. We will not repeat at length analyses and citations from that case or from those law review articles, except as necessary to show that principles of sound judicial administration and of comity require the reversal or modification of the rule in Second Circuit, as applied in this case.

In Winters, the Second Circuit recognized that the doctrine of res judicata, in its twin parts of "case preclusion" and "issue preclusion" (or collateral estoppel) were applicable to civil rights actions. In Winters, a constitutional argument was made in the lower state courts, although the case was decided on other grounds and without mention of the constitutional argument in the decision of the Appellate Division, and although the New York Court of Appeals dismissed the appeal "upon the ground that no substantial constitutional question (was) directly involved." Nevertheless the Second Circuit found that Winters claim was barred by the doctrine of collateral estoppel because the issue had been raised and its determination was necessary to the final state court decision. The Court expressly declined to decide whether or not Winters claim would also have been barred under the case preclusion aspect of the defense of res judicata, noting that by so doing the Court avoided the conflict between the New York State rule of case preclusion, which applied to all issues which were or which could have been raised in the prior case, and the "general Federal rule", under which the Second Circuit had limited the defense to issues actually raised. That issue, skirted by the Second Circuit in Winters v. Lavine, and alluded to by this Court in its decision in Huffman v. Pursue Ltd. (420 U.S. 592 [1975]), in which the defense of res judicata appeared appropriate but had not been pleaded, is squarely presented by this case.

The reasons given for the limitation of the application of this defense in civil rights cases are summarized by the Second Circuit itself in Winters, and in the three law review articles previously cited. They

are the fear that the state courts cannot be trusted to fairly and competently enforce the Federal Civil Rights Statutes, the interpretation of that statute as intended to give litigants the right to reserve Federal civil rights questions for the Federal Courts, and the recognition that a litigant involuntarily involved in a state court proceeding would be deprived of the right to reserve the Federal questions for the Federal courts if the traditional concept of res judicata was applied. None of these considerations is relevant to the facts of this case.

There is simply no justification for any assumption that the New York courts could not fairly have adjudicated any alleged violations of §1983 (Huffman v. Pursue, 420 U.S. at 611). The facts were fully established and uncontested in both the State and the Federal courts, and respondent has never contended that she was deprived of an opportunity to submit any evidence in support of her application, or that she has, even now, anything to submit or to say that was not submitted and said at the time of her application in 1971. Consequently, this is not a case in which the application of the defense of case preclusion would deprive a litigant of the opportunity of a trial in Federal Court or elsewhere of factual issues relevant to a claim of denial of civil rights.

Furthermore, this is a civil, not a criminal matter (Parker v. McKeithen, 488 F 2d 553 (5th Cir. 1974), cert. den. 419 U.S. 838). Petitioner was represented by an attorney from the very inception of the administrative proceeding which led to these nine years of litigation. Her own informed voluntary choice of forum, and not any state action or the application of the rule of Younger v. Harris (401 U.S. 37 [1971]), put her in the state courts, and the exception to the defense of res judicata is not necessary to protect her from the involuntary loss of a Federal forum for her civil rights contentions (Parker v. McKeithen, supra; Scoggin v. Schrunk, 522 F 2d 436 [9th Cir. 1975]; cf. England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 [1974]).

There is no justification in the civil rights statute itself, or in the decisions of this Court for the failure to apply the defense of res judicata as required by state law and by 28 U.S.C. section 1738 (Preiser v. Rodriguez, 411 U.S. 475 [1973]). The extensive analysis of the cases by the Second Circuit in Winters v. Lavine, supra clearly shows that the Second Circuit has strong doubts about its own rule and recognizes that it is inconsistent with section 1738. Other circuits have applied state defenses of res judicata to issues which could have been but were not raised in prior state proceedings (Roy v. Jones, 484 F 2d 96 [3rd Cir. 1973]; Davis v. Towe, 526 F 2d 588 [4th Cir. 1975], aff'd 379 F. Supp. 536 [E.D. Va. 1974]; Brown v. Chastain, 416 F 2d 1012 [5th Cir. 1969]; Coogan v. Cincinnati Bar Association, 431 2d 1209 [6th Cir. 1970]; Blankner v. Chicago, 504 F 2d 1037 [7th Cir. 1974]; Francisco Enterprises, Inc. v. Kirby, 482 F 2d 481 [9th Cir. 1973]; Flynn v. St. Board of Chiropractic Examiners, 418 F 2d 668 [9th Cir. 1969]; Frangier v. East Baton Rouge Parish School Board, 363 F 2d 861 [5th Cir. 1966]). This Court should resolve the issue, and apply the New York law of res judicata to this case.

The declaratory judgment granted by the Second Circuit in this case clearly undermined the prior judgment of the State courts, and by accepting this case, the lower Federal courts really constituted themselves as appellate courts over the State courts, a clear violation of 28 U.S.C. 1257, which confers exclusive appellate jurisdiction in such cases on this Court, and a collateral attack on the State court judgment (Huffman v. Pursue Ltd., 420 U.S. at p. 609; Rooker v. Fidelity Trust Co., 263 U.S. 413 [1923]; Roy v. Jones, supra; Brown v. Chastain, supra; Coogan v. Cincinnati Bar Association, supra; Blankner v. City of Chicago, supra).

Although the reasons for the exception to the normal application of res judicata are absent in this case, the reasons for the defense of res judicata are present.

As a matter of public policy and sound judicial administration there must be an end to litigation. This case has been in the courts for approximately nine

years and has reached all three levels of State courts followed by all three levels of Federal courts. To permit her to raise the question of a hearing for the first time five years after the determination and seven months after the final judgment of the highest State court, and to then argue that the failure to give her a hearing she never asked for was a violation of her civil rights and can only be rectified by giving her a license is to permit a flagrant misuse of the judicial process. This rule of the Second Circuit permitting successive suits in State and Federal courts in civil rights actions obviously promotes unnecessary litigation by encouraging litigants to bring successive suits.

For all of the foregoing reasons, this Court should overrule the special Second Circuit rule of Lombard v. Board of Education, supra and apply the New York principle of res judicata to this case. Under that rule, the defense of res judicata should be sustained, since the parties and cause of action were the same, respondent was represented by an attorney and voluntarily brought her case in State court, and none of the special reasons given for not applying the normal rule are present in this case.

The "cause of action" was the same, notwithstanding the fact that section 1983 was not specifically mentioned in the State courts, under the meaning of the terms "cause of action" or "claim and demand" as they have been construed in connection with the defense of res judicata by the New York courts and in the Revised Restatement of Judgments. As Professor Hyatt states the rule, in his recent thorough analysis of the problem in The University of Chicago Law Review (Vol. 45, at p. 340):

> "Accordingly, under the revised Restatement of Judgments a single 'claim' (cause of action) for res judicata purposes 'includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.' "

In this case and in the State court proceedings all of respondent's claims arose out of one transaction - the denial of her application for waiver of the examination requirement. The mere addition of an additional theory under section 1983 does not constitute a new cause of action (Scoggin v. Schrunk, 522 F 2d 436 [9th Cir. 1975]). And under New York law, as summarized in Winters v. Lavine (574 F 2d at p. 56):

> "The New York courts appear to recognize that the two lawsuits are based on the 'same cause of action' if a 'different judgment in the [later action] would destroy or impair rights or interests established by the [earlier action].' Schuykill Fuel Corp. v. B. & C. Nieberg Realty Corp., supra, 250 N.Y. at 307, 165 N.E. at 457; accord, e.g. Erbe v. Lincoln Rochester Trust Co., supra, 3 N.Y. 2d at 327, 165 N.Y.S. 2d at 112, 144 N.E. 2d at 81."

The State court judgment in the instant case had established that respondent was not entitled to a license without examination and that petitioners had no further obligation in that respect. This judgment was clearly destroyed and the entire matter reopened by the judgment of the District Court.

The complaint should have been dismissed under the case preclusion aspect of the defense of res judicata.

The issue preclusion aspect of res judicata is also a defense in this action to the issues litigated in the State court action. These include the determination that New York Education Law, section 6506 did not authorize the licensure of respondent on the facts in this record, and that her New York examination results,

together with her past practice, her licensure in Maine and New Hampshire, and her passing the private licensing examination, were not the substantial equivalent of the New York requirements.

B. STATUTE OF LIMITATIONS

Under New York law a proceeding to review a determination of a state agency must be commenced within four months (New York Civil Practice Law and Rules section 217). The Second Circuit, however, applies a three year statute of limitations, borrowed from New York Civil Practice Law and Rules section 214, to cases under section 1983. Under either statute, this action was not timely. It was not commenced until June 25, 1976, over four years after the determination made November 22, 1971, and over seven months after the final judgment in the State courts.

The Court below erred in rejecting this defense and in finding and applying an inherent power to toll the running of the period of limitations during the pendency of plaintiff's State court proceedings. The District Court was in obvious doubt about its authority in this respect, and relied for authority on Mizell v. North Broward Hospital District (427 F 2d 468 [5th Cir. 1970]). The Circuit Court cited Williams v. Walsh (558 F 2d 667 [2nd Cir. 1977]); and Ornstein v. Regan (574 F 2d 115 [2nd Cir. 1978]) as authority for tolling the statute of limitations.

We argue that the authority posited by the Fifth Circuit in Mizell does not exist, and even if it did exist it would be an abuse of discretion to apply it in this case. Our argument is very cogently made for us by the First Circuit in the very recent case of Ramirez de Arellano v. Alvarez de Choudens (575 F 2d 315 [1st Cir. 1978]). That Court stated the rule to be that "prior actions in the state courts do not toll the applicable statute of limitations" citing Williams v. Walsh, supra; and Meyer v. Frank (550 F 2d 726 [1977]) from the Second Circuit; and Ammlung v. City of Chester (494 F

2d 811 [3d Cir. 1974]). The Court disposed of Mizell in the following apt footnote (at p. 320):

> "4. One federal court, although conceding that state law did not provide a rule allowing related actions to toll a §1983 suit, has suggested that federal policies underlying §1983 might require the fashioning of a federal tolling rule to that effect. See Mizell v. North Broward Hospital Dist., 427 F 2d 468 (5th Cir. 1970). Subsequent decisions of that circuit have refused to follow Mizell's dicta. see Blair v. Page Aircraft Maintenance, Inc., 467 F 2d 815 (5th Cir. 1972), and the reasoning underlying those remarks was rejected by the Supreme Court in Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 95 S. Ct. 1716, 44 L. Ed. 2d 295 (1975). Every court of appeals that has since considered the issue has refused to follow Mizell, Meyer v. Frank, supra at 729; Ammlung v. City of Chester, supra at 816."

There is neither Federal nor State statutory authority for the tolling of the statute of limitations in this case. Mizell has been on the books for over eight years. It has not been followed by other Circuit Courts and has perhaps even been abandoned in the Fifth Circuit, as the above quotation suggests. Congress has seen no need to enact a Federal tolling provision.

Three years is not an unreasonably short time. Respondent was represented by an attorney, and must be presumed to have known her legal rights and options. The Second Circuit has reserved the authority to toll a statute of limitations where the application of the

statute "would frustrate the policy underlying the federal cause of action asserted." It has recognized that the decision whether or not to toll involves a balancing of "the protection of the substantial federal policy under consideration on the one hand and protection of the policy behind the statute of limitations on the other hand. The respondent's conduct - particularly his diligence in pressing his claim - also is taken into account" (Meyer v. Frank, supra at p. 729).

It is hard to see any substantial Federal policy which would be subverted by applying the three year statute in this case. The District Court denied respondent all of the relief she asked for, merely finding that she should have been offered a hearing. Assuming for the purpose of considering the statute of limitations argument that these findings are correct, they do not amount to the implementation of a substantial federal policy sufficient to override the harm to petitioners, and the public policy served by statutes of limitations. Respondent's course of action in defining the issues in the Article 78 proceeding lulled petitioners into a justifiable sense of repose. To toll the statute of limitations in this case would encourage litigants, especially those whose interests would be served by delay, to try cases piecemeal and by successive actions in State and Federal courts. The result would be to delay eventual justice and to subject the courts and defendants to two lawsuits where one would suffice. Finally, the full faith and credit mandate of 28 U.S.C. §1738, discussed above, is also applicable here and should have led to the application of the New York statute of limitations.

Conclusion

IT IS RESPECTFULLY SUBMITTED THAT THE JUDGMENT OF THE COURT BELOW SHOULD BE REVERSED, AND THE COMPLAINT DISMISSED.

Dated: December 13, 1979

Respectfully submitted,

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UNITED STATES CONSTITUTION AMENDMENT XIV

Section 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S. CODE 1738

Section 1738. State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. June 25, 1948, c.646, 62 Stat. 947.

42 U.S. Code Section 1983

FEDERAL CIVIL RIGHTS STATUTE

Section 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATUTES INVOLVED
IN THIS CASE

APPENDIX

FORMER EDUCATION LAW PROVISIONS PROVIDING SPECIAL EXAMINATIONS FOR "GRANDFATHER" CHIROPRACTORS.

Section 6556. Present practitioners

1. The department shall issue a license to an applicant who files his application, accompanied by a fee of forty dollars, prior to July first, nineteen hundred sixty-five, and who:

a. is twenty-one years of age or over;

b. is a citizen of the United States or who has duly declared his intention of becoming a citizen in accordance with law;

c. is a graduate of a resident course in chiropractic, consisting of not less than two school years of formal study;

d. is of good moral character;

e. is a resident of this state and has been a resident for at least one year prior to July first, nineteen hundred sixty-three;

f. has engaged for the period of at least the fifteen years immediately prior to July first, nineteen hundred sixty-three, in the practice of chiropractic in this state; and

g. passes an examination prepared by the board in the practice of chiropractic and an examination in the use and effect of X-ray.

If the person making application for a license under the provisions of this subdivision does not possess X-ray equipment and does not desire or intend to use X-ray in his practice, the examination in the use and effects of X-ray may be waived by the department upon the submission to it by the person seeking licensure of a suitable affidavit attesting to such lack of possession of X-ray equipment and the desire or intent not to use X-ray. Any certificate of license issued to such a person shall plainly state on the face thereof that the holder is not authorized to use X-ray in his practice, and the holder thereof shall not use X-ray, notwithstanding the provisions of paragraph f of subdivision three of section sixty-five hundred fifty-eight of this chapter. If such a person subsequently certifies that he wishes to use X-rays in his practice he may do so upon passing the examination required by this subdivision.

* * * *

3. The department shall issue a license to an applicant who files his application, accompanied by a fee of forty dollars, prior to July first, nineteen hundred sixty-five, and who at the time meets the requirements set forth in paragraphs a, b, c, d and e of subdivision one of this section and who:

a. has been engaged for the period of at least the two years, and not more than the seven years, immediately prior to July first, nineteen hundred sixty-three, in the practice of chiropractic in this state;

b. passes an examination prepared by the department in the basic subjects of anatomy, physiology, chemistry, hygiene, bacteriology, pathology and diagnosis; and

c. in addition to such written examination, passes a written examination prepared by the board in the use and effects of X-ray and a practical examination prepared by the board in chiropractic.

If the person making application for a license under the provisions of this subdivision does not possess X-ray equipment and does not desire or intend to use

X-ray in his practice, the examination in the use and effects of X-ray may be waived by the department upon the submission to it by the person seeking licensure of a suitable affidavit attesting to such lack of possession of X-ray equipment and the desire or intent not to use X-ray. Any certificate of license issued to such a person shall plainly state on the face thereof that the holder is not authorized to use X-ray in his practice, and the holder thereof shall not use X-ray, notwithstanding the provisions of paragraph f of subdivision three of section sixty-five hundred fifty-eight of this chapter. If such a person subsequently certifies that he wishes to use X-rays in his practice he may do so upon passing the examination required by this subdivision.

NEW YORK EDUCATION LAW SECTION 6551 SUBDIVISION 1 DEFINING CHIROPRACTIC

Section 6551, subdivision 1:

The practice of the profession of chiropractic is defined as detecting and correcting by manual or mechanical means structural imbalance, distortion, or subluxations in the human body for the purpose of removing nerve interference and the effects thereof, where such interference is the result of or related to distortions, misalignment or subluxation of or in the vertebral column.

NEW YORK EDUCATION LAW SECTION 6506
AUTHORIZING THE BOARD OF REGENTS TO
WAIVE SPECIFIC LICENSING REQUIREMENTS
IN ANY PROFESSION OR TO INDORSE LICENSES
OF OTHER JURISDICTIONS

Section 6506. Supervision by the board of regents

The board of regents shall supervise the admission to and the practice of the professions. In supervising, the board of regents may:

* * * *

(5) Waive education, experience and examination requirements for a professional licensee prescribed in the article relating to the profession, provided the board of regents shall be satisfied that the requirements of such article have been substantially met;

(6) Indorse a license issued by a licensing board of another state or country upon the applicant fulfilling the following requirements:

(a) Application: file an application with the department;

(b) Education: meet educational requirements in accordance with the commissioner's regulations;

(c) Experience: have experience satisfactory to the board in accordance with the commissioner's regulations;

(d) Examination: pass an examination satisfactory to the board and in accordance with the commissioner's regulations;

(e) Age: be at least twenty-one years of age;

(f) Citizenship: be a United States citizen, or file a declaration of intention to become a citizen, unless such requirement is waived, in accordance with the commissioner's regulations;

(g) Character: be of good moral character as determined by the department; and

(h) Fees: pay a fee to the department for indorsement of forty dollars.

FORMER NEW YORK STATUTORY PROVISIONS
REPLACED EFFECTIVE SEPTEMBER 1, 1971
BY SECTION 6506, SET FORTH ABOVE

Section 211. Supervision of professions

* * * *

2. The regents may by rule or order accept evidence of preliminary and professional education, and where practice

is a prerequisite to licensure may receive evidence of such practice in whatever state or country the same may have been obtained or engaged in, for licensing a candidate to practice any such profession in lieu of that prescribed by the laws relating to such profession; provided it shall appear to the satisfaction of the regents that such candidate has substantially met the requirements of such laws.

3. And the regents shall have further power to indorse a license issued by a legally constituted board of examiners in any other state or country upon satisfactory evidence that the applicant has met any requirements in force in this state as to citizenship and residence and has completed, as of the date of such application, education and training which is substantially the equivalent of the requirements in force in this state when such license was issued, and that the applicant has been in the lawful and reputable practice of his profession for a period of not less than five years prior to his making application for such indorsement, or in the event that a lesser period of practice, or no practice, is required for indorsement of a license to practice such profession by the provisions of this chapter relating to the practice of the particular profession, such license may be indorsed upon submission of satisfactory evidence that the applicant has met the requirement of such other provision as to practice. When the evidence presented is not satisfyingly sufficient

to warrant the indorsement of such license, the board of regents may require that the candidate for indorsement shall pass such subjects of the licensing examination specified by statute or regents rule as should be required of the candidate to establish his worthiness to receive such indorsement.

* * * *

Section 6553. Licenses

* * * *

2. The department may also, without the examination herein provided, license the holder of a duly issued and valid license to practice chiropractic granted by any other state or country after examination passed subsequent to the effective date of this act, upon payment of the fee herein provided, provided (a) that such examination was substantially equivalent in content, character and quality to the examinations given in this state at the time the applicant obtained such license from such other state or country, (b) that the preliminary and professional education of the applicant shall have been not less than that required pursuant to section sixty-five hundred fifty-one of this article, at the time of his application, and (c) that he shall have been in practice continuously for not less than five years immediately next preceding his application.

* * * *

IN THE

Supreme Court of the United States

October Term, 1979

Docket No.
79-424

In the Matter of the Application
of
THE BOARD OF REGENTS of the University of the State of New York and EWALD NYQUIST, as Commissioner of Education and Chief Administrative Officer of the Education Department of the State of New York,

Petitioners,

vs.

MARY TOMANIO,

Respondent.

On Certiorari to the Court of Appeals
For the Second Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

1. On the facts of this case was it error for the lower courts to hold that due process requires the offer of a hearing and a statement of reasons?

2. Did the Court below fail to give proper faith and credit to the interpretation of state statutes by the New York courts?

3. Did the Court below err in refusing to dismiss the complaint on the defenses of *res judicata* and failure to comply with the statute of limitations?

STATEMENT OF THE CASE

Dr. Tomanio, a 62 year old woman, has practiced chiropractic legally in New York State since 1958. After a licensing statute was first enacted there, she took a series of examinations, all parts of which she passed, except one, which she failed by six-tenths of one percentage point. She therefore applied to the New York State Regents for a waiver of that examination requirement, which the Regents were empowered to give by a provision of the State Education Law. The Regents refused her request without giving her a hearing or reasons for their refusal.

Dr. Tomanio then brought a proceeding in the state court on January 26, 1972 alleging that the Regents' refusal was an arbitrary and capricious exercise of their authority.

The New York State Supreme Court gave judgment for Dr. Tomanio and ordered the Education Department to issue a license to her. However, the Appellate Division reversed that judgment and that reversal was sustained by the New York Court of Appeals on November 20, 1975.

On June 25, 1976, Dr. Tomanio brought this action in the United States District Court for the Northern District of New York under the Fourteenth Amendment and the Civil Rights Act, 42 U.S.C. Section 1983, claiming that she was denied due process by the Regents when they refused her request for a waiver, without giving her a hearing or specifying reasons for their refusal. The Regents answered and moved to dismiss the action on the grounds of *res judicata*, a statute of limitations, and failure to state a cause of action.

The District Court denied the motion on all grounds and gave a declaratory judgment that Dr. Tomanio has been denied due process. The Court of Appeals, Second Circuit, affirmed. This Court granted certiorari.

SUMMARY

Dr. Tomanio's long years of legal professional practice prior to the enactment of a chiropractic licensing procedure in New York State was a "property" and "liberty" interest protected by the Fourteenth Amendment of the Constitution of the United States. She still had that interest when she applied to the Regents for waiver of her failure, by six-tenths of one percentage point, on one of three parts of the licensure examination. The interest continued through that waiver application procedure because (1) she was practicing legally at the time; (2) the procedure which the legislature had provided for those who substantially met license requirements, and Dr. Tomanio's factual situation which came so close to meeting those requirements, created an arrangement, understanding and reasonable expectation that she would receive her license; and (3) the interest protected was the right to continue professional employment.

Therefore, Dr. Tomanio was entitled to due process in connection with her waiver request since it involved the exercise of a very broad discretionary authority and, although the demands of due process vary depending on the facts of each situation, at a minimum, some kind of hearing and statement of reasons is required. Neither of these was provided at all.

None of the Regents' defenses of comity, *res judicata* or statute of limitations can be sustained. In holding that the Regents must utilize constitutional procedures in exercising their power, the federal courts have not decided any matter previously determined by a New York State Court, nor have they permitted relitigation of any issue raised in the state court proceeding by Dr. Tomanio. And the finding of the federal courts, that the *res judicata* doctrine does not apply, in federal civil rights cases, to issues that could have been, but were not, raised in a prior state court proceeding, serves the long recognized, valid and desirable purpose of preserving the right to a federal forum for constitutional questions.

The decision of the lower courts to toll the applicable statute of limitations, in certain civil rights cases, during the period in which a state proceeding is in progress, serves the interests of federalism and reduces the growing federal caseload of such litigation. Since Dr. Tomanio prosecuted her claims diligently and the policy of repose which underlies statutes of limitations is not frustrated in this case, the courts correctly tolled the statute in this instance.

POINT I

BOTH LOWER COURTS CORRECTLY FOUND THAT DR. TOMANIO HAD A "PROPERTY" AND "LIBERTY" RIGHT THAT MANDATED A DUE PROCESS HEARING AND STATEMENT OF REASONS.

There is no dispute of the fact that Dr. Tomanio was practicing chiropractic legally when she applied to the New York State Regents for a waiver of a licensure examination requirement so that she might continue to practice. She had been in practice before any licensing procedure was established and that practice was the sole support of her family. Even the Regents agree (Petitioners brief, at 8) with the District and Circuit Court findings that the opportunity to continue in her profession represented a Fourteenth Amendment "property" right as defined by this Court in *Board of Regents v. Roth*, 408 U.S. 564, 576-577 (1972). There, the Court stated that the term included "interests that a person has already acquired in specific benefits" even where statutory eligibility has not yet been established. This Court stressed, *Roth*, at 577, the importance of protecting "those claims upon which people rely in their daily lives" against arbitrary termination. And recently, in *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*, 99 S. Ct. 2100, 2105 (1979), the Court emphasized the significance of situations such as Dr. Tomanio's by quoting Judge Henry Friendly. Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1296 (1974):

"There is a human difference between losing what one has and not getting what one wants."

Dr. Tomanio's employment, and particularly its professional nature, also gave her a "liberty" interest. *Roth*, at 572, 574; *Willner v. Committee on Character*, 373 U.S. 96, 102 (1962); *Schware v. Board of Bar Examiners*, 353 U.S. 232, (1957); *Goldsmith v. Board of Tax Appeals*, 270, U.S. 117, 123 (per Ch. Justice Taft, 1926); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

After the New York State Legislature decided to license chiropractors, it provided for those already in practice to obtain licenses in two separate ways. One method was by meeting all of the requirements set forth in Section 6556 of the State Education Law (Petitioner's Brief, A-4 to A-7), including examinations. The other was by Section 211 of that law, which was replaced in 1971 by Section 6506, subdivision (5). The last statute permits waiver of "education, experience and examination requirements" for licensure upon a showing that such requirements have been "substantially met". This is the statute under which Dr. Tomanio applied for the waiver of her failure by six-tenths of one percentage point, on one of three parts of the examination.

Dr. Tomanio's right to continue to practice was recognized and accepted by the Regents during the eight years in which the special series of examinations for "grandfather" practitioners were administered, and during which, litigation and other attacks on the propriety of the first five examinations was undertaken by chiropractic groups. Surely that "property" and "liberty" right continued during the brief period following her narrow failure of a part of the test, when she tried to obtain the license she needed, in order to continue her practice by the other method provided by

the legislature; i.e., by demonstrating to the Regents that she had "substantially met" the requirements. She made her application on September 21, 1971, just a few weeks after Section 6506 (5) of the Education Law (Petitioner's Brief, at A-8) replaced Section 211 (Petitioner's Brief at A-9 to A-11). Section 211 did not give the Regents authority to waive examination requirements; but that power was added in the new statute. The new law and the change it encompassed certainly provided the kind of "rules or mutually explicit understandings" to support a claim of "property interest" contemplated in *Perry v. Sinderman*, 408 U.S. 593, 601 (1972), particularly in view of the fact that Dr. Tomanio had met all requirements for licensure, except one, and had come so close to meeting that one.

It should, perhaps, be pointed out that, when Dr. Tomanio applied for the waiver, she was still practicing legally. The letter from the State Education Department dated September 7, 1971 and received by her September 15, 1971 (Cir. Ct. proceedings, Ex. A. to app., at 34) to which petitioners refer (Petitioner's Brief, at 9) advised her only that, if she did not obtain licensure within 30 days, she then would be expected to give up her practice.

Since Dr. Tomanio had a "property" and "liberty" interest protected by the Fourteenth Amendment there can be no question as to her entitlement to due process when she applied to the Regents for a waiver. And due process mandates that an adjudicative decision be preceded by a hearing of some kind. *Goss v. Lopez*, 419 U.S. 565, 576 (1975); *Roth*, at 569, 570; *Fuentes v. Shevin*, 407 U.S. 67, 86 (1972). Further, as the Court of Appeals pointed out, this Court has specifically insisted on a hearing when the determination involved the discretionary power to admit to a profession. *Willner*, at 103; *Goldsmith*, at 123. And when, as here, the authority given to a state agency is so broad, and at stake is not the admission, but the right to con-

tinue, a long established professional practice, how much more compelling are the reasons for that finding.

Due process further demanded that the Regents give Dr. Tomanio reasons for their denial of her application. *Perry*, at 601; *Wilner*, at 105. It is clear from their letter of November 22, 1971 (Cir. Ct. proceedings, Ex. A. to app., at 33) that they failed totally, to do so, and comments made much later, in responsive pleadings, during the litigation challenging the decision, did not compensate for that failure.

This Court has made clear that the existence of a constitutionally protected "property" or "liberty" interest mandates due process, and that the relative weight of the interests involved determines only the kind of hearing and other elements of due process that must be afforded. *Goss*, at 576, 577; *Roth*, at 570, 571. In this case, no hearing at all and no reasons, were given to Dr. Tomanio, so no such weighing process can be used. Nonetheless, since the Regents have tried to raise that question, it is enlightening to consider here the three factors that this Court has indicated are pertinent, when what is being reviewed is the adequacy, rather than the total lack, of due process. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

> "First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

The "private interest" here is of enormous importance, the right of a 62-year old woman to continue to practice the profession by which she has supported her family for 22 years without a blemish to her personal or professional reputation and record. The significance of the second factor, with respect to the lack of a hearing, was best expressed by the Court of Appeals (A-60 n.2):*

> "....A logical argument can be made that, since Dr. Tomanio is licensed in two other states, has practiced successfully for so many years, and passed her National Boards, she might be able to convince an impartial hearing officer that she 'substantially' meets the requirements of the statute, notwithstanding her failure of the examination by six-tenths of one percent...."

Further, had Dr. Tomanio been given a hearing under circumstances likely to produce a fair and impartial decision, she could have offered evidence by her peer group and patients, of her competence and substantial compliance with licensure requirements, and other materials which might have been persuasive.

The result of the Regents failure to tell Dr. Tomanio why they rejected her waiver application, at the time they did, is more dramatic. Former Section 211 of the New York State Education Law (Petitioners' brief, at A-9 to A-11) empowered the Regents to waive professional licensure requirements only for out of state residents coming to New York to practice. Section 6506 (5) which replaced it, allows the Regents to:

> "Waive education, experience and examination requirements for a professional license prescribed in the article relating to the profession, provided the Board of Regents shall be satisfied that the requirements of such article have been substantially met;"

*References in ( ) are to Petitioners' appendices and papers.

The new statute cannot possibly be construed to reflect a legislative intent to restrict its application to persons coming to New York from other states. So the broadening of the power by a new statute must be seen as a deliberate effort by the state legislature to expand the potential benefits of the statute to New York residents. But, not until submission of the briefs in the Federal Court of Appeals, did Dr. Tomanio learn that the Regents have interpreted Section 6506 (5) as applying only to non-residents of New York, as did the former statute, and that this was at least part of the reason for their refusal of her waiver request. Had Dr. Tomanio been told this when her request was denied, she would have challenged the Regents interpretation of Section 6506 (5) in her state court proceeding.

And, as to the third factor mentioned in *Mathews*, the Regents' claim of the great burden which would be imposed by due process is belied by their own answer to the interrogatories in this matter (A-32). In response to a question as to whether a license had ever been granted under Section 6506 (5) or former Section 211, they answered that only one person beside Dr. Tomanio had ever applied for such a waiver. Certainly, it can be expected that the vast majority of "grandfathers" in any profession will either pass a new licensing examination, or will fail by too large a margin to raise a claim of substantial compliance.

This Court has not allowed administrative agencies to cavalierly dismiss due process with claims of inconvenience. As Justice White said in *Stanley v. Illinois*, 405 U.S. 645, 656 (1972):

> "But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones."

It is therefore clear that, even if the criteria of *Mathews* were relevant in this situation in which no due process at all was afforded, they would testify to a very serious and unwarranted denial of a constitutional right by the Regents. In this context, Justice Marshall's words in *Board of Curators, University of Missouri v. Horowitz*, 435 U.S. 78, 100 (1978) are appropriate:

> "....when the State seeks 'to deprive a person of a way of life to which she has devoted years of preparation and on which she has come to rely' it should be required to first provide a 'high level of procedural protection' ".

The Regents have cited cases in their brief which they claim support a thesis that this Court has been willing to deny due process even on a finding of a constitutional right. That, however, is not true. In *Leis v. Flynt*, 439 U.S. 438 (1979) and *Roth*, the Court found that no such right existed. And in *Mathews*, the determination was that a hearing at a later stage of the proceedings satisfied due process demands.

Although, as set forth above, the licensure examinations are not relevant to this matter, the Regents have tried to make them so. They continually stress Dr. Tomanio's failures in order to impugn her ability. In response, it must be said that there was sound cause for a competent chiropractor to fail those examinations. Many did. After the first two examinations, only 48% of "grandfathers" in Dr. Tomanio's experience category, had passed. The examinations were considered so inappropriate by the profession, that they were challenged in court, and the Appellate Division did, in fact, direct that they be changed.

Albert v. Allen, 27 A.D. 2d 615, 275 N.Y.S. 2d 759 (1966). The profession also contemplated suit to set aside the next three examinations, because critical portions were prepared by medical doctors whose viewpoint reflected their profession's fervent opposition to the recognition or legal existence of chiropractic as a healing art. However, before a new action was started, the law was changed so that all examinations, starting with the sixth, were prepared by chiropractors. It was this sixth examination which Dr. Tomanio failed by just six-tenths of a percentage point. The only other examination she took after that, and the only one available to her ever since then, is the regular examination given and geared to new graduates of chiropractic schools. This court surely understands how hard it is for a person who has practiced a profession and not been in school for 22 years, to cope with an academic examination.

In light of all of the foregoing facts, law and circumstances, the District Court and the Second Circuit were plainly correct in finding that Dr. Tomanio was denied due process to which she was constitutionally entitled.

POINT II

THE FEDERAL COURT DECISION DOES NOT DEAL WITH ANY MATTER ALREADY DETERMINED BY THE NEW YORK STATE COURTS.

The only determination made by the federal Courts in this matter is that the discretionary authority vested in the Regents must be exercised in a constitutional manner. No decision of a New York State Court is in conflict with that holding. Nor could the New York Courts interpret a statute in a way that would utilize it unconstitutionally.

The New York decisions which the Regents claim conflict with the determination herein, were all made in proceedings brought under Section 7803 (3) of the New York Civil Practice Law and Rules. That statute permits challenges to administrative rulings only to determine if the record presented to the Court indicates that they were arbitrary and capricious. The New York courts have interpreted their power under this statute to be confined to an examination of the record to find whether it shows any rational basis for the administrative finding, and have insisted that they cannot substitute their own judgment for that of the agency, *Purdy v. Kreisberg*, 47 N.Y. 2d 354, 391 N.E. 1307, 418 N.Y.S. 2d 329; *Matter of Pell v. Board of Educ.*, 34 N.Y. 2d 222, 231, 313 N.E. 2d 321, 326, 356 N.Y.S. 2d 833, 839 (1974). None of the New York decisions, dealing as they had to, only with the reasonableness of conclusions reached by administrative bodies, could possibly have conflicted with the findings of the federal Courts which dealt with procedures.

POINT III

THERE IS NO BASIS FOR A FINDING OF *RES JUDICATA*

The Regents have misstated the issues raised by the complaint herein. Dr. Tomanio did ask, *inter alia*, for the declaratory judgment which the court gave, that she had been denied due process. That issue was never raised in the state court proceeding.

Further, this court has repeatedly stated that plaintiffs who have a claim under the federal Civil Rights Act need not first seek relief in the state courts. *Preiser v. Rodriguez*, 411, U.S. 475, 477 (1972); *McNeese v. Board of Education*, 373 U.S. 668, 671 (1963); *Monroe v. Pape*, 365 U.S. 167, 183 (1961). Therefore, the Second Circuit has ruled that constitutional issues not raised in a state court proceeding are not precluded by *res judicata* from subsequent litigation in a federal forum. *Ornstein v. Regan*, 574 F. 2d 115, 117 (2d Cir. 1978); *Lombard v. Board of Educ.*, 502 F. 2d 631, 635 (2d Cir. 1974), cert. denied 420 U.S. 976 (1975). To hold otherwise would be inconsistent. For as the court said in *Ornstein:*

> "To apply *res judicata* effect to a state remedy which need not be first sought, is to 'overrule the essence of *Monroe v. Pape.*' "

The refusal to find *res judicata* as to issues which could have been, but were not, raised in a state court proceeding is consistent with this Court's holding in abstention cases. The Court's position has been that a litigant who wants to prosecute a constitutional claim in a federal forum, cannot be compelled to do so in a state court. *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 415, 417 (1964).

Since the issues raised in this matter were not raised in the New York courts, and the law does not preclude Dr. Tomanio from litigating in federal courts, issues which could have been, but were not, raised in state courts, there is no basis for a finding of *res judicata*.

POINT IV

THE LOWER COURTS PROPERLY EXERCISED THEIR POWER TO TOLL THE STATUTE OF LIMITATIONS.

It is well established law in the Second Circuit that the appropriate New York statute of limitations in Civil Rights cases is the three-year provision of Section 214 of the New York Civil Practice Law and Rules, which covers actions to recover upon a liability imposed by statute. *Swan v. Board of Higher Education of City of New York*, 319 F. 2d 56, 60, (2d Cir. 1963). The federal Court applied that in this matter, but tolled it during pendency of the state litigation. It did so for sound reasons of federalism. For only if a plaintiff is assured of not losing his right to turn to a federal forum for relief, will he refrain from bringing such an action until his state litigation is over. Such plaintiffs may then get complete relief from the state courts and avoid the federal suit entirely.

As the lower courts said, tolling was particularly appropriate in this case. Dr. Tomanio's state suit was brought promptly after the Regents refused her waiver request. The first decision was in her favor and was not finally reversed by the highest state court until after the three-year statute of limitations had expired. Dr. Tomanio then brought her federal action promptly. In no sense did she sleep on her rights.

Contrary to the Regents statements, this tolling policy has not been discredited, but has been endorsed again by the Second Circuit, *Leigh v. McGuire*, No. 79-7479 (Dec. 19, 1979), the Fifth Circuit, *Mizell v. North Broward Hospital District*, 427 F. 2d 468, 474 (1970) and the Third Circuit, *Ammlung v. City of Chester*, 494 F. 2d 811, 816 (1974). And except for *Ramirez de*

Arellano v. Alvarez de Choudens, 575 F. 2d 315 (1st Cir. 1978), all of the cases and circuits cited by the First Circuit and the Regents, support the tolling policy applied in this case. In fact there is a special irony in the fact that most of the Regents' citations are earlier cases in the Second Circuit, whose decision they are attacking here. Even in *Ramirez*, the refusal to toll was based chiefly on the court's interpretation of the local tolling statute rather than on rejection of the policy applied here.

Finally, the policy of repose which underlies statutes of limitations is not an issue here. There is no evidence to grow stale, no witnesses to forget. There is only an issue of law; and under these circumstances, the lower courts correctly tolled the statute.

CONCLUSION

The Court should affirm the decisions of the District and Circuit Courts and declare that Dr. Tomanio is entitled to a hearing before a fair and impartial body, and a statement of reasons, before a determination is made on her request for a waiver under Section 6506, Subdivision 5 of the New York Education Law.

Respectfully submitted,

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